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ARTICLES

CONSTITUTIONAL CASES 2001: AN OVERVIEW

Patrick J. Monahan*

This book, which consists of the papers presented at Osgoode Hall Law School's 5th Annual Constitutional Cases Conference held on April 12, 2002, examines the constitutional decisions of the Supreme Court of Canada released in the calendar year 2001.[1] The Court handed down a total of 91 decisions in 2001, including 19 constitutional decisions.[2] This represents the largest number of total judgments released by the Supreme Court since 1998, and a significant increase from the 72 decisions released in calendar year 2000. It is difficult to identify the reason for the increased output in 2001, but one factor may have been the fact that for the first time in a number of years, the Court was at full strength and had a stable membership.

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1 A case is considered to be a "constitutional case" if the decision of the Court involves the interpretation or application of a provision of the "Constitution of Canada," as defined in s. 52 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

2 The 19 constitutional decisions in calendar year 2001 were as follows: *Dunmore v. Ontario (Attorney General)* (2001), 207 D.L.R. (4th) 193 (S.C.C.); *Law Society (British Columbia) v. Mangat* (2001), 205 D.L.R. (4th) 577 (S.C.C.); *Mitchell v. M.N.R.*, [2001] 1 S.C.R 911; *O.E.C.T.A. v. Ontario (Attorney General)*, [2001] 1 S.C.R. 470; *R. v. Advance Cutting and Coring Ltd.* (2001), 205 D.L.R. (4th) 385 (S.C.C.)*; R. v. Dutra*, [2001] 1 S.C.R. 759; *R. v. Golden*, (2001), 207 D.L.R. (4th) 18 (S.C.C.)*; R. v. Hynes* (2001), 206 D.L.R. (4th) 483 (S.C.C.); *R. v. Latimer*, [2001] 1 S.C.R. 3; *Ontario v. 974649 Ontario Inc.* (2001), 200 D.L.R. (4th) 444 (S.C.C.); *R. v. Pan*; *R. v. Sawyer*, [2001] 2 S.C.R. 344*; R. v. Ruzic*, [2001] 1 S.C.R. 687; *R. v. Sharpe*, [2001] 1 S.C.R. 45; *Smith v. Canada*, 2001 S.C.C. 88; *Therrien (Re)*, [2001] 2 S.C.R 3; *United States v. Burns*, [2001] 1 S.C.R. 283; *United States v. Cobb*, [2001] 1 S.C.R. 587; *United States v. Tsioubris*, [2001] 1 S.C.R. 613; *United States v. Kwok*, [2001] 1 S.C.R. 532; *United States v. Shulman*, [2001] 1 S.C.R. 616. Note that the facts and judgment in *Cobb* and *Tsioubris* were identical, and so these decisions are treated as a single case.

The Court was unanimous in 82 percent of its judgments released in 2001, including in 79 percent (15/19) of the constitutional cases.[3] This rather remarkable degree of unanimity is the highest in the past 15 years, and confirms the fact that Canada's highest court manifests a much higher degree of consensus than its American counterpart (which is unanimous in approximately 40-45 percent of its appeal judgments). Despite the tendency of commentators to focus on differences amongst members of the Court, in this past year in particular the Court was in broad agreement on the vast majority of matters it decided.

The Court also dealt with 668 leave applications in 2001, which is a record. Almost 200 leave applications were filed from the province of Quebec alone, as compared to just 130 Quebec leave applications in 2000. The number of leave applications from Ontario and the Federal Court of Appeal declined slightly in 2001, while the leave applications from the other provinces remained constant.[4]

I. CHARTER CASES

Of the 19 constitutional cases in 2001, 16 were Charter cases. The Charter claimant was successful in 8 of these 16 cases in 2001 which, as Table 1 below indicates, equals the highest success rate for Charter claims in the past decade.[5] However, despite fluctuations in the individual yearly outcomes, overall the success rate for Charter claims over the past decade has remained relatively constant, with approximately one out of every three Charter claims being determined by the Supreme Court of Canada in favour of the claimant. This established equilibrium in the outcomes of Charter cases reflects the fact that, with the Court now able to largely control its own docket through the process of granting leave to appeal, it is able to ensure that it only hears cases with a reasonable prospect of success.

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[3] A decision is considered to be unanimous when all members of the Court concur in the result, even if different reasons are written in support of that result.

[4] Statistics on leave applications are available from the Court at <www.scc-csc.gc.ca> under the link "Information on Cases".

[5] A Charter claim is treated as being successful when the claimant receives some form of relief under s. 24 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, or where a statute or other legal rule is declared to be inconsistent with the Constitution of Canada under s. 52 of the *Constitution Act, 1982*.

Table 1
Success Rate of Charter Claimants
At the Supreme Court of Canada 1991-2001

Year	Charter Challenges	Claimant Succeeds	Success Rate
1991	35	15	43%
1992	38	12	32%
1993	42	9	21%
1994	26	11	42%
1995	33	8	24%
1996	35	8	23%
1997	20	10	50%
1998	21	8	38%
1999	14	5	36%
2000	11	3	27%
2001	16	8	50%
TOTAL	291	97	33%

A number of the Court's 2001 Charter decisions received widespread media attention, particularly the *R. v. Sharpe* decision on child pornography in January and the *United States v. Burns* decision on extradition in February. However, as the paper in this volume by Osgoode Hall Law School Professor Jamie Cameron argues, two of the most significant 2001 Charter decisions from a public policy and jurisprudential perspective were the freedom of association cases released near the end of the year, *Dunmore v. Ontario (Attorney General)* and *R. v. Advance Cutting and Coring Ltd.*

1. Fundamental Freedoms and Equality

In one sense, the contrast between *Dunmore* and *Advance Cutting and Coring* is striking. In *Dunmore*, the Court ruled that Ontario statutory provisions which excluded agricultural workers from a provincial labour relations regime were unconstitutional, whereas in *Advance Cutting and Coring* the Supreme Court deferred to the Quebec National Assembly and upheld statutory provisions which required workers in the construction industry in that province to become a member in one of five government-recognized employee associations. The decision in *Dunmore* can properly be charactered as an activist one since, as Justice Robert Sharpe (as he then was) had ruled in a lengthy and

reasoned judgment at first instance, the exclusion of agricultural workers from the provincial labour relations regime did not prevent such workers from forming an association.[6] The complaint of the applicants in *Dunmore* was that they were being denied certain statutory protections that they regarded as essential in order to form a trade union.[7] However, as Sharpe J. pointed out (and as the Ontario Court of Appeal had unanimously agreed),[8] these complaints seemed to be directed at the private actions of employers rather than the legislative regime itself. The Supreme Court of Canada had decided in *Dolphin Delivery*[9] that the Charter did not apply to private action, which seemed to suggest that the freedom of association claim must necessarily fail on the basis that the limits on the applicants' freedom of association did not arise from government action.

The Supreme Court decided otherwise, by an 8-1 margin. The majority judgment of Bastarache J. concluded that the exclusion of agricultural workers from the provincial labour relations scheme had the effect of substantially interfering with their right to organize collectively. The Supreme Court agreed with the applicants' argument that, without the protection of the labour relations regime, agricultural workers had no realistic chance of associating. But what of Sharpe J.'s point that this denial of the right to associate was attributable to the private actions of employers rather than of the government or the legislature, and thus was not subject to the Charter? While the Supreme Court's reasoning on this point is not entirely clear, Bastarache J. seems to argue that the claim is susceptible to Charter review because it is based on both section 2(*d*) and section 15 of the Charter.

Bastarache J. emphasizes in his reasons that the complaint of the applicants is that the legislation is "underinclusive," in the sense that it denies to agricultural workers a benefit or right that is accorded to others. Bastarache J. acknowledges that where a group makes a claim that legislation is underinclusive, the normal course is to review such underinclusiveness under section 15(1) rather than section 2(*d*). But, according to Bastarache J., where this underinclusiveness results in the violation of freedom of association, that violation may be subject to Charter review on the basis of section 2(*d*) even where the limitations

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[6] See *Dunmore v. Ontario (Attorney General)* (1997), 155 D.L.R. (4th) 193 (S.C.), at 206-207.

[7] For example, the applicants objected to the fact that agricultural employers were able to deny union organizers access to private property to meet with workers to persuade them to join a union, as well as to the fact that agricultural workers who attempted to form a trade union might be subject to economic reprisals from their employers.

[8] In a short judgment, Krever J.A. of the Ontario Court of Appeal, concurred in by Doherty and Rosenberg JJ.A., had agreed with the reasons of Sharpe J. See *Dunmore v. Ontario (Attorney General)* (1999), 182 D.L.R. (4th) 471 (C.A.).

[9] *R.W.D.S.U. v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573.

on freedom of association arise from the actions of private employers rather than the government. How this should be so, given the fact that section 32 limits the Charter to the actions of the government or legislature, is never clearly explained by Bastarache J., although he does comment at one point that the "message" of the legislation is to implicitly encourage employers to thwart the organizing efforts of their agricultural workers. But Bastarache J. did not point to any evidence establishing a causal connection between the enactment of the impugned legislation and actions taken by employers. In any event, assuming such a causal connection could be established or assumed to exist, then surely this in itself would have been sufficient to engage the application of the Charter, without having to resort to a novel theory about the application of section 2(*d*) to the actions of private employers in circumstances where legislation could be said to be underinclusive.

It is unclear as to how far this novel argument extending the application to the Charter in cases of underinclusive legislation will apply in future cases. Bastarache J. repeatedly emphasizes the "exceptional" character of the claim in this particular case, which leaves the Supreme Court ample room to back away from or modify this new line of argument in future cases.[10] A much more direct and straightforward approach would have been simply to analyze the claim under section 15, since there is no doubt that underinclusive legislation is subject to review under section 15. Yet the Court may have felt itself unable to pursue this obvious and direct route because of the highly complicated and unsatisfactory character of the Court's equality rights jurisprudence under section 15. In fact, as Sonia Lawrence points out in her commentary on section 15(1) jurisprudence at the Supreme Court of Canada this past year, the Court's section 15 test as set forth in the 1999 decision in *Law v. Canada*[11] is increasingly seen as problematic. In particular, the requirement that legislation be found to demean "human dignity" before a section 15 violation can be established is not only highly subjective, but it seems to narrow unduly the scope of the equality guarantee.[12] In fact, as Lawrence points out in her commentary, the Court's divided decision in *Lavoie v. Canada (Public Service Commission)*,

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[10] For example, in para. 22 Bastarache J. states that legislation that is underinclusive may "in *unique* contexts, substantially impact the exercise of a constitutional freedom" (emphasis added); in para. 28, Bastarache J. notes that such claims will not be common, while in para. 30, he describes such claims as "rare" [*Dunmore v. Ontario (Attorney General*, *supra*, note 2].

[11] *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497.

[12] A much more straightforward approach would be to declare that legislation that imposes differential treatment on the basis of an enumerated or analogous ground is presumptively contrary to s. 15, and must be justified under s. 1. For an analysis along these lines, see the judgment of McLachlin J. (as she then was) in *Miron v. Trudel*, [1995] 2 S.C.R. 418.

released in early 2002,[13] is the first indication that some members of the Court may be sufficiently unhappy with the *Law* test such that they may be prepared to revisit it in the future.

If *Dunmore* took a broad view of the associational claim in that particular case, the decision in *Advance Cutting and Coring* indicated that the Court is still seriously divided as to the overall meaning of the guarantee of freedom of association in section 2(*d*). At issue in *Advance Cutting and Coring* was Quebec legislation which required workers in the construction industry in Quebec to join one of five government-recognized trade unions. While the Court ultimately upheld the legislation on the basis that the legislation's infringement of section 2(*d*) could be upheld as a reasonable limit under section 1, there were four separate opinions written, and none of them commanded the support of a majority of the Court.

The Court did affirm, by an 8-1 margin, the principle that section 2(*d*) includes a negative right not to associate, in addition to a positive right to associate.[14] However, the eight members of the Court who accepted this proposition did so for three separate sets of reasons, written by LeBel J. (for himself, Gonthier and Arbour JJ.), Bastarache J. (for himself, McLachlin C.J., Major and Binnie JJ.) and Iacobucci J. on his own behalf. Moreover, each of the three opinions on this point adopted a different formulation of the circumstances in which a negative right not to associate will be engaged by legislation or government action. The opinion of Bastarache J., which was supported by four members of the Court, seemed to suggest that a requirement to join a trade union was necessarily a form of ideological coercion that violated section 2(*d*), given the nature of trade unions as participatory bodies holding political and economic roles in society. In contrast, LeBel J., whose opinion was supported by a total of three members of the Court, argued that a requirement to join a trade union violated section 2(*d*) only where there was evidence that the particular unions involved had ideologically coerced their members. Since there was no such evidence in the record, in LeBel J.'s view the freedom of association claim failed. Finally, Iacobucci J. argued in his opinion that where the state obliges an association of individuals whose affiliation is already compelled by the "facts of life" (such as through a common workplace), there is no violation of freedom of association, provided that the compelled association "furthers the common good." However, in Iacobucci J.'s view the compelled trade union membership in this case was not shown to further the common good, since

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[13] [2002] SCC 23.

[14] Only L'Heureux-Dubé J. dissented on this point, with the judgments of LeBel, Bastarache and Iacobucci JJ. for the other eight members of the Court affirming this principle, which had previously been recognized in *Lavigne v. O.P.S.E.U.*, [1991] 2 S.C.R. 211.

union membership was not linked to any competency requirement and there was a clear violation of workers' liberty interests. In the result, the Court ruled by a narrow 5-4 majority that the compelled membership in a trade union in this particular case violated section 2(*d*), with the majority consisting of Bastarache J. (and three others) and Iacobucci J.

On section 1, Bastarache J. would have found the legislation to be an unjustified infringement of freedom of association and would have ruled the relevant statutory provisions to be invalid.[15] But Iacobucci J. parted company with Bastarache J. on the section 1 issue, with Iacobucci J. agreeing with LeBel J. that the legislation was adopted "within a unique and complex historical context . . . to promote distinct social and economic objectives that were, and remain, pressing and substantial."[16] The Court was thus evenly divided 4-4 on whether the legislation could be upheld as a reasonable limit under section 1.[17] Since L'Heureux-Dubé J. had found that there was no violation of section 2(*d*) in the first place (on the basis that section 2(*d*) did not include a right not to associate), in the result the legislation was upheld as valid.

While the reasoning in *Advance Cutting and Coring* failed to clarify the scope of section 2(*d*), it did reflect the Supreme Court's continuing caution with respect to cases originating from the province of Quebec. As Table 2 below indicates, over the past five years, the Court has ruled Quebec legislation or government action to be unconstitutional on two occasions, *Reference re Secession of Quebec*[18] and *Libman v. Quebec (Attorney General)*.[19] Yet in both instances, the Court's opinion was carefully circumscribed and tailored so as to avoid any appearance of thwarting the prerogatives or jurisdiction of the Quebec government or National Assembly. In *Libman*, for example, the Court struck down a provision which prohibited spending by independent third parties in a provincial referendum campaign. At the same time the Court went out of its way to indicate that substitute legislation permitting very modest third party expenditures would likely be constitutionally valid, and the Quebec National Assembly followed up this suggestion by enacting such legislation. In *Reference re Secession of Quebec* the Court did rule that Quebec's unilateral secession from Canada was not authorized by the Canadian Constitution, but it also declared that a clear majority vote on a clear referendum question on secession

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[15] Bastarache J. would have suspended the declaration of invalidity for a period of 18 months to permit the government to consider amendments to its legislation. See *Advance Cutting and Coring*, *supra*, note 2, at para. 52.

[16] *Ibid.*, at para. 290.

[17] The ninth member of the Court, L'Heureux-Dubé J., did not find it necessary to deal with s. 1 since in her view there was no violation of s. 2(*d*).

[18] [1998] 2 S.C.R. 217.

[19] [1997] 3 S.C.R. 569.

would give rise to a constitutional duty on the Canadian government and the governments of the other provinces to negotiate the terms of secession in good faith. This argument was not raised by the *amicus curiae* and appeared to have been developed by the Court *e propio motu.*[20]

[20] See Monahan, "The Public Policy Role of the Supreme Court of Canada in the *Secession Reference*" (1999), 11 *N.J.C.L.* 65.

TABLE 2
Supreme Court Decisions Declaring Statutes or Regulations Unconstitutional, 1997-2001[21]

2001	**Constitutional Provision**	**Result**
Dunmore v. Ontario (Attorney General) (2001), 207 D.L.R. (4th) 193 (S.C.C.).	Charter, s. 2(*d*)	Exclusion of agricultural workers from Ontario *Labour Relations Act* violates s. 2(d).
Law Society (British Columbia) v. Mangat (2001), 205 D.L.R. (4th) 577 (S.C.C.).	Federalism, paramountcy	Provincial *Legal Profession Act* inoperative as it applies to non-lawyers acting before the Immigration and Refugee Board due to conflict with paramount federal legislation
***R. v. Ruzic*, [2001] 1 S.C.R. 687.**	Charter, s. 7	Statutory defence of duress, as described by s. 17 of the *Criminal Code*, held to violate s. 7 for failure to allow for persons not acting with moral voluntariness.
***R. v. Sharpe*, [2001] 1 S.C.R. 45.**	Charter, s. 2(b)	Exceptions read into s. 163.1(4) of *Criminal Code* to save provision under s. 1.
2000		
***Little Sisters Book & Art Emporium v. Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120.**	Charter, s. 2(b)	Section 152(3) of *Customs Act*, placing the onus on an importer of expressive material to justify importation, violates s. 2(b) of the Charter.
1999		
R. v. Sundown, [1999] 1 S.C.R. 393.	Aboriginal, s. 35, *Constitution Act, 1930*	Provincial Park regulations (Saskatchewan) inapplicable due to conflict with treaty rights.
Westbank First Nation v. British Columbia Hydro & Power Authority, [1999] 3 S.C.R. 134.	Federalism, s. 125, *Constitution Act, 1867* ["C.A. 1867"]	Indian Band taxation by-laws inapplicable to provincial utility due to s. 125 of C.A. 1867.
***Corbiere v. Canada (Minister of Indian & Northern Affairs)*, [1999] 2 S.C.R. 203.**	Charter, s. 15	Exclusion of off-reserve band members from voting privileges by s. 77(1) *Indian Act* violates s. 15 of Charter.
M. v. H., [1999] 2 S.C.R. 3.	Charter, s. 15	Definition of spouse in Ontario *Family Law Act* violates 15(1).
M & D Farm Ltd. v. Manitoba Agricultural Credit Corp., [1999] 2 S.C.R. 961.	Federalism, paramountcy	Provincial Court order obtained pursuant to *Family Farm Protection Act* (Manitoba) invalid due to conflict with paramount federal legislation.
U.F.C.W., Local 1518 v. KMart Canada Ltd., [1999] 2 S.C.R. 1083.	Charter, s. 2(b)	Overbroad definition of picketing in *Industrial Relations Act* of New Brunswick violates s. 2(b).
1999 (cont'd)	**Constitutional Provision**	**Result**

***R. v. Marshall*, [1999] 3 S.C.R. 456.**	Aboriginal, s. 35	Federal fisheries regulations interfere with treaty right to fish, not applicable to the accused.
1998		
Eurig Estate (Re), [1998] 2 S.C.R. 565.	Federalism, s. 53, C.A. 1867	Regulation under the Ontario *Administration of Justice Act* providing for probate fees ruled unconstitutional
Vriend v. Alberta, [1998] 1 S.C.R. 493.	Charter, s. 15	Provincial human rights code unconstitutional for failing to prohibit discrimination on the basis of sexual orientation.
***Thomson Newspapers v. Canada* (*Attorney General*), [1998] 1 S.C.R. 877.**	Charter, s. 2(b)	Provision in *Canada Election Act* prohibiting publication of polls for 72 hours prior to election date ruled invalid.
***R. v. Lucas*, [1998] 1 S.C.R. 439.**	Charter, s. 2(b)	Part of defamatory libel provision in *Criminal Code* ruled unconstitutional as an unjustified limit on free expression.
1997		
Godbout v. Longueuil (*City*), [1997] 3 S.C.R 844.	Charter, s. 7	Residency requirement by municipality of Longueuil ruled an unconstitutional infringement of liberty under s. 7.
Reference Re Remuneration of Judges of the Provincial Court of Prince Edward Island, [1997] 3 S.C.R. 3.	Charter, s. 11 and Federalism (preamble)	Legislation reducing salaries of provincial court judges in three provinces ruled unconstitutional as infringing judicial independence; provinces required to set up independent commissions to make recommendations as to provincial court salaries.
Libman v. Quebec (Attorney General), [1997] 3 S.C.R. 569.	Charter, s. 2(b)	Spending limits in Quebec referendum legislation ruled unconstitutional limit on freedom of expression.
***Benner v. Canada* (*Secretary of State*), [1997] 1 S.C.R. 358**.	Charter, s. 15	Provision in federal *Citizenship Act* requiring children born abroad of a Canadian mother prior to 1977 to undergo a security check ruled unconstitutional as a violation of equality rights.
Delgamuukw v. British Columbia, [1997] 3 S.C.R. 1010.	Aboriginal, s. 35	B.C. legislation cannot extinguish Aboriginal title in B.C.

[21] Cases in bold denote federal statutes or regulations. Table includes all constitutional cases (including *Charter*, federalism and Aboriginal).

In *Advance Cutting and Coring*, the opinions of LeBel J. and Iacobucci J. reflected extreme caution on the part of the Court in reviewing a deliberate and relatively recent policy choice of the Quebec National Assembly. Both opinions emphasized the fact that the legislation at issue reflected complex and difficult trade-offs that had been made by the Quebec National Assembly, and that this policy determination was therefore entitled to substantial judicial deference. LeBel J. in particular also argued that federalism considerations militated in favour of the validity of the legislation, since the scheme was a product of the particular historical experience of Quebec's labour relations regime and "this Court's approach to . . . federalism accepts the legislative solutions specific to each province."[22] Thus an important ingredient leading to the result in *Advance Cutting* must surely have been the Court's reluctance to tamper with an important social and political compromise that seemed to have worked tolerably well in the province of Quebec for an extended period of time.

2. Other Charter Cases

There were two other Charter cases in 2001 in which statutory provisions were ruled unconstitutional, but neither had the impact or significance of *Dunmore*. In the high-profile case of *Sharpe*, the Court ruled that the existing *Criminal Code*[23] provisions prohibiting the possession of child pornography were overly broad, but the Court then went on to "read in" a number of narrow exceptions to the legislation in order to render it valid. At a subsequent trial held in early 2002, Sharpe was convicted of possession of child pornography on the basis of the *Criminal Code* provisions as amended by the Court.[24] The other 2001 case which struck down a statutory provision was *Ruzic*, where the Supreme Court ruled that section 17 of the *Criminal Code*, which defined the defence of duress, violated section 7 and could not be justified under section 1. But this merely had the effect of substituting the common law defence, which was only slightly broader than the statutory version of the defence.[25]

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[22] *Advance Cutting and Coring*, *supra*, note 2, at para. 276.

[23] R.S.C. 1985, c. C-46.

[24] See *R. v. Sharpe*, [2002] B.C.J. No. 610 (S.C.), online: QL (BCJ).

[25] Section 17 of the *Criminal Code* [am. R.S.C. 1985, c. 27 (1st Supp.), s. 40(2) (Sch. I, item 1)] was found to be unconstitutional in that it only permitted an accused to invoke the defence of duress when compelled to commit an offence under threats of immediate bodily harm from a person who was present when the offence was committed. The Court found that this was a violation of s. 7 of the Charter, since it would permit the conviction of a person who committed an offence because of threats of death or serious bodily harm, if the individual making the threats was not present at the scene of the crime, or if the threats of harm were not immediate. The common law defence, which did not have these criteria of immediacy and presence, was found not to have been

Challenges to government decisions or actions (as opposed to statutes or regulations) succeeded in five Charter cases in 2001, including *Burns*, in which the Court found that the Minister of Justice's decision to extradite an accused to the United States without seeking assurances that the death penalty would not be imposed violated section 7 of the Charter.[26] While highly symbolic, the impact of *Burns* will likely be limited to the extradition context. The Court's analysis of the meaning of the "principles of fundamental justice" under section 7 in *Burns* does not appear to have broken any new ground, and was very much focussed on the concerns that have arisen in recent years over the appropriateness of the death penalty. While there are certain statements in the case suggesting that any attempt to re-institute the death penalty in Canada might well violate the Charter, there seems little practical likelihood of any such initiative being advanced by the Canadian government in the foreseeable future. Indeed, as the Court itself emphasized in its reasons, the dominant international trend is towards abolition, rather than retention or expansion of the use of the death penalty.

II. ABORIGINAL CASES IN 2001

In *Mitchell v. M.N.R.*, the only Supreme Court Aboriginal rights case of 2001, the Court found that Mohawk Canadians of Akwesasne did not have a constitutionally protected Aboriginal right to bring goods across the Canada-U.S. border free of customs duty. As the two commentaries on the case included in this volume explain,[27] *Mitchell* is significant for a number of reasons. First, while Mitchell himself had defined the Aboriginal right in question as the right to bring three categories of goods across the border for limited trade with certain Aboriginal partners, the Supreme Court rejected this characterization and held, instead, that the right at issue was simply the right to bring goods across the border "for purposes of trade."[28] The majority judgment of McLach-

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superseded by the statutory defence and was accordingly substituted by the Court for the invalid s. 17.

[26] See the commentaries by Martin, "Extradition, the Charter and Due Process" and by Young, "Fundamental Justice and Political Power," included in this volume. In addition to *Burns*, challenges to government action succeeded in the following: *Golden* (holding that a strip search performed at a restaurant was unreasonable); *974649 Ontario Inc.* (holding that a justice of the peace has the power to order costs against the Crown); and *Cobb*, *Tsioubris*, *Kwok* and *Shulman*, all of which held that extradition proceedings should be stayed due to the improper conduct of U.S. government officials.

[27] See Hutchins and Choksi, "From Calder to Mitchell" and Christie, "The Court's Exercise of Plenary Power."

[28] See the judgment of McLachlin C.J., concurred in by Gonthier, Iacobucci, Arbour and LeBel JJ. [*Mitchell v. M.N.R.*, *supra*, note 2]. Binnie J. wrote a separate concurring opinion (concurred in by Major J.) which agreed with the reasons of the Chief Justice and added separate reasons of his own.

lin C.J. argued that the right should be characterized in this manner due to the nature of the ancestral practice relied on as well as the governmental legislation with which it conflicted. But perhaps the most telling point was the practical one. If Chief Mitchell was allowed to bring goods across the border, for specific or limited purposes without the payment of duty, there would be no means of enforcing these limitations; once the goods were across the border they could be traded with anyone for any purpose. Thus the proposed limitations on the scope of the Aboriginal right to transport goods across the border would in practice prove illusory, which was a key consideration that led the Court to characterize the right more broadly as simply the right to transport goods across the border for trade.[29]

Mitchell is also significant for the comments of the Court on the admissibility and use of evidence in Aboriginal cases, particularly oral histories. The Court in *Delgamuukw*[30] had held that oral histories of Aboriginal peoples were admissible and had to be given appropriate weight in the fact-finding process. But in *Mitchell* the Court placed some important qualifiers on the use of oral histories. First, the Court stated that oral histories are not automatically admissible, but have to satisfy tests of usefulness and reasonable reliability.[31] Second, even where admissible, the reliance on oral histories must not negate the operation of "general evidentiary principles," with the Court noting that "[t]here is a boundary that must not be crossed between a sensitive application and a complete abandonment of the rules of evidence."[32] According to the Court, claims of Aboriginal rights must be supported by "cogent evidence establishing their validity on a balance of probabilities," and "[s]parse, doubtful and equivocal evidence cannot serve as the foundation for a successful claim."[33] The Court went on to conclude that there was insufficient evidence to support the trial judge's finding

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Thus the reasons of the Chief Justice appear to have enjoyed the support of all seven members of the Court who participated in the appeal.

[29] *Ibid.*, at para. 20. This concern over the practical consequences of recognition of an Aboriginal right has not always been addressed directly by the Supreme Court. The discussion of these practical concerns in *Mitchell* may well be a reflection of the experience of the Court following the decision in *R. v. Marshall*, [1999] 3 S.C.R. 456 ("*Marshall No. 1"*), in which the recognition of an Aboriginal right to fish for eels led to a wide variety of claims by Aboriginal peoples to exploit natural resources in Atlantic Canada. The Court subsequently issued a clarification of its views in *R. v. Marshall*, [1999] 3 S.C.R. 533 [*"Marshall No. 2"*], in which it was pointed out that the initial decision could not necessarily be applied in these rather different contexts.

[30] *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010.

[31] *Mitchell v. M.N.R., supra*, note 2, at para. 33.

[32] *Ibid.*, at paras. 38, 39.

[33] *Ibid.*, at para. 51.

that the Mohawks had an ancestral practice of transporting goods across the St. Lawrence River for the purposes of trade. While findings of fact are entitled to deference from an appellate court, the trial judge's findings in this case represented a "palpable and overriding error" warranting the substitution of a different result.

The Supreme Court's finding that there was insufficient evidence to establish an Aboriginal right to transport goods across the Canada-U.S. border for purposes of trade was sufficient in itself to dispose of the appeal. But two members of the Court, Binnie and Major JJ., went on to consider and to accept an alternative argument advanced by the Crown which would have precluded recognition of the right claimed in any event.[34] This argument was that the doctrine of "sovereign incompatibility" continued to exist in Canadian constitutional law despite the enactment of section 35(1) of the *Constitution Act, 1982*,[35] and that the application of this doctrine precluded the recognition of a right to enter Canada free of a requirement to pay duty. While acknowledging that the doctrine of sovereign incompatibility had in the past been applied in an overly expansive manner by the Courts, with the result that Aboriginal rights were unduly narrowed or deemed to have been extinguished, Binnie J. affirmed that the doctrine remains an element of the Canadian constitutional order. Binnie J. went on to conclude that an essential attribute of state sovereignty is the right to control who will enter the state's territory. Since the Aboriginal right claimed in this case was inconsistent with this key aspect of Canadian sovereignty, the right in question must be held to have been extinguished by the assertion of British sovereignty in North America. The acceptance of this argument, even if only by two members of the Court, must be counted as a major new development in Aboriginal rights jurisprudence; the existing test for the recognition and application of Aboriginal rights, as stated in *Van der Peet*,[36] makes no reference whatever to the doctrine of sovereign incompatibility as a means whereby Aboriginal rights can be extinguished.[37]

In general terms, what is most striking about all of these various doctrinal developments in *Mitchell* is the evident desire on the part of the Court to narrow or limit certain aspects of the more expansive doctrines favouring Aborigi-

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[34] The judgment of McLachlin C.J. expressly refused to comment on the argument relating to "sovereign incompatibility" that was discussed and accepted by Binnie J. See *ibid.*, at para. 64.

[35] The doctrine of sovereign incompatibility involves the claim that the assertion of sovereignty by the European powers in North America was necessarily incompatible with the survival and continuation of Aboriginal rights. See the judgment of Binnie J., *ibid.*, at para. 67.

[36] See *R. v. Van der Peet*, [1996] 2 S.C.R. 507.

[37] See Slattery, "Making Sense of Aboriginal and Treaty Rights" (2000), 79 Can. Bar Rev. 196.

nal rights put forward in cases such as *Delgamuukw* and *Marshall No. 1*.[38] What *Mitchell* indicates is that the recognition and affirmation of Aboriginal rights under section 35(1) must not be construed in such a way that compromises the practical and effective enforcement of Canadian laws. This carries forward and reinforces the tendency reflected in the Court's opinion in *Marshall No. 2*,[39] where the Court had sought to limit the scope and potential application of the principles announced in *Marshall No. 1*. Of course, *Mitchell* was released prior to the events of September 11, 2001, and the events of that day can be expected to reinforce the sentiments expressed by the Court in *Mitchell*.

III. Federalism Doctrine at the Supreme Court of Canada

There were three federalism cases decided by the Supreme Court of Canada in 2001: *Mangat* (ruling that the federal *Immigration Act*[40] is inconsistent with and paramount over B.C.'s *Legal Profession Act*),[41] *Therrien (Re)* (upholding provisions in Quebec's *Courts of Justice Act*[42] permitting the removal of judges of the Court of Quebec);[43] and the *O.E.C.T.A.* case (upholding a new scheme for school funding in Ontario).[44] The federalism docket in 2001 reflects the tendency of the recent past, in which constitutional litigation has increasingly focussed on Charter and Aboriginal issues, as opposed to federalism concerns. Indeed, as Table 3 below indicates, over the past five years, there has been a total of just 15 federalism cases decided by the Supreme Court of Canada. These numbers are reminiscent of the 1950s and 1960s and are a far cry from the early 1980s, the high-water mark of federalism litigation at the Supreme Court of Canada in the past 50 years, when the Court was deciding an average of over 11 federalism cases annually.

TABLE 3
Federalism Cases at the SCC 1950-2001[45]

TIME PERIOD	FEDERALISM CASES	TOTAL CASES	AVERAGE

38 See *supra*, note 29.
39 *Ibid.*
40 R.S.C. 1985, c. I-2.
41 R.S.B.C. 1996, c. 255.
42 R.S.Q. c. T-16.
43 See the commentary by Sharpe included in this volume on this case.
44 See the commentary by Hogg included in this volume on this case.

1950-59	30	651	3/year — 4.6% of total
1960-69	36	1161	3.6/year — 3.1% of total
1970-79	54	1464	5.4/year — 3.7% of total
1980-84	57	524	11.4/year — 10.9% of total
1997-2001	15	438	3/year — 3.4% of total

The success of the federal government in federalism litigation at the Supreme Court of Canada in the recent past is also noteworthy. There have been only two federal statutes whose validity has been challenged on federalism grounds before the Supreme Court of Canada over the past five years, and in both instances the federal statute was upheld as valid.[46] In contrast, a total of ten provincial statutes or government actions were challenged before the Supreme Court of Canada over the past five years, and the challenge was successful on four occasions.[47] Two of those cases involved paramountcy arguments, in which the Court found that provincial legislation was inoperative due to conflict with paramount federal legislation;[48] this confirms a newfound willingness on the part of the Court to invoke paramountcy considerations as a basis for

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[45] The 15 federalism decisions (*i.e.*, cases in which a provision of the *Constitution Act, 1867* [(U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5] was the basis of the decision) released by the Court from January 1, 1997 until December 31, 2001 are as follows: *Germain v. Montreal (City)*, [1997] 1 S.C.R. 1144; *Air Canada v. Ontario (Liquor Control Board)* [1997] 2 S.C.R. 581; *R. v. Hydro-Québec*, [1997] 3 S.C.R. 213; *Westcoast Energy Inc. v. Canada (National Energy Board)*, [1998] 1 S.C.R. 322*; Reference re Secession of Quebec*, [1998] 2 S.C.R. 217; *Eurig Estate (Re)*, [1998] 2 S.C.R. 565; *Consortium Developments (Clearwater) Ltd. v. Sarnia (City)*, [1998] 3 S.C.R. 3; *M & D Farm Ltd. v. Manitoba Agricultural Credit Corp.*, [1999] 2 S.C.R. 961; *Westbank First Nation v. British Columbia Hydro & Power Authority*, [1999] 3 S.C.R. 134; *Global Securities Corp. v. British Columbia (Securities Commission)*, [2000] 1 S.C.R. 494; *Reference re Firearms Act (Canada)*, [2000] 1 S.C.R. 783; *Public School Boards' Assn. (Alberta) v. Alberta (Attorney General)*, [2000] 2 S.C.R. 409; *O.E.C.T.A. v. Ontario (Attorney General)*, [2001] 1 S.C.R. 470; *Therrien (Re)*, [2001] 2 S.C.R. 3; *Law Society (British Columbia) v. Mangat* (2001), 205 D.L.R. (4th) 577 (S.C.C.).

[46] See *R. v. Hydro-Quebec*, [1997] 3 S.C.R. 213 (upholding provisions of the *Canadian Environmental Protection Act*, R.S.C. 1985 (4th Supp.), c. 16) and *Reference re Firearms Act*, [2000] 1 S.C.R. 783 (upholding the *Firearms Act*, S.C. 1995, c. 39). A third case involving federal jurisdiction, *Westcoast Energy Inc. v. Canada (National Energy Board)*, [1998] 1 S.C.R. 322, upheld the jurisdiction of the National Energy Board over a gas pipeline undertaking but did not involve the validity of a statutory provision.

[47] See *Eurig Estate (Re)*, [1998] 2 S.C.R. 565; *Reference re Secession of Quebec*, *supra*, note 18; *M & D Farm Ltd. v. Manitoba Agricultural Credit Corp.*, [1999] 2 S.C.R. 961; and *Mangat*, *supra*, note 2.

[48] In addition to *Mangat*, *ibid.*, a paramountcy argument succeeded in *M & D Farm Ltd.*, *ibid.*

limiting the operation of provincial laws.[49] In these instances, however, the Court is merely giving effect to statutes enacted by Parliament, as opposed to attempting to limit provincial jurisdiction on the basis of the Court's own interpretation of the open-ended categories in sections 91 and 92 of the *Constitution Act, 1867*. In general terms, it is evident that federalism litigation is today much less significant, both in terms of the numbers of cases as well as their practical impact, than was the case 20 years ago.

IV. CONCLUSION

In addition to tracking and analyzing the Supreme Court's constitutional jurisprudence in 2001, the papers in this volume also consider a number of broader issues and developments that have occupied both the Supreme Court and Canadian governments in recent years. The paper by Supreme Court Justice Louis LeBel considers the Supreme Court's increasing reliance on international law and international legal principles in the development of Canadian domestic law, while Ontario Court of Appeal Justice Robert Sharpe considers the manner in which the Court has interpreted and applied the principle of judicial independence in recent years. The papers by Morris Rosenberg and by David Sgayias of the federal Department of Justice consider remedial issues that have arisen in the Court's constitutional jurisprudence, while Mark Freiman, the Deputy Attorney General of Ontario, reflects on the impact that the Charter has on the role of the Attorney General as chief legal adviser to the Crown. Geoffrey Cowper and Lorne Sossin explore a neglected topic in Canadian constitutional law, the role of a political questions doctrine, arguing that our own Supreme Court might benefit by having regard to the manner in which such a doctrine has been developed in the United States. David Paciocco provides a thoughtful contribution on the impact that the newly-enacted *Anti-terrorism Act*[50] is likely to have on the interpretation and application of fundamental constitutional norms in the years ahead.

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[49] Earlier indications of this new attitude can be found in *Bank of Montreal v. Hall*, [1990] 1 S.C.R. 121 and *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453.

[50] S.C. 2001, c. 41.

Table 4
Dissents[51] in Constitutional Cases on the McLachlin Court
January 1, 2000-January 28, 2002

Justice	Dissents (Dissents Authored)	Direction of Dissent — favoured Claim/Challenge	Direction of Dissent — Opposed Claim/Challenge
McLachlin C.J	4 dissents (authored none)	3	1
L'Heureux-Dubé J.	1 dissent (authored none)	0	1
Gonthier J.	1 dissent (authored none)	0	1
Iacobucci J.	3 dissents (authored 1)	3	0
Major J.	4 dissents (authored 3)	3	1
Bastarache J.	2 dissents (authored 2)	1	1
Binnie J.	3 dissents (authored 0)	3	0
Arbour J.	5 dissents (authored 2)	5	0
LeBel J.	2 dissents (authored 1)	2	0

Looking ahead, over the next 12 months two new members will be joining the Court, replacing recently retired Justice Claire L'Heureux-Dubé and Justice Charles Gonthier (the latter scheduled to retire in mid-2003). Following the retirement of Gonthier J. there is only one more retirement from the Supreme Court expected over the next decade, that of Justice Major scheduled for 2006. This suggests that the membership on the Court may well be entering a period of relative stability that could stretch throughout the next decade.

It also suggests that the selection of these two new members of the Court in 2002-2003 could well be pivotal for the shape of the Court's constitutional jurisprudence. As Table 4 indicates, the retiring justices, L'Heureux-Dubé and Gonthier JJ., have tended to be more supportive of government claims in cases based on sections 7-14 of the Charter than have most of their colleagues. (Moreover, in the initial two years following the appointment of Beverley

[51] Dissents are cases in which at least one member of the Court would have disposed of some part of the case differently; thus concurrences in the result are not counted as dissents. During the relevant period, the Court was unanimous in 26/35 constitutional cases (74%). Breakdown of cases in which there were dissents is as follows: an 8-1 split occurred in 2 cases; a 6-3 split in 1 case; a 5-2 split in 2 cases; and a 5-4 split in 4 cases.

McLachlin as Chief Justice in January 2000, L'Heureux-Dubé and Gonthier JJ. dissented in just one constitutional case.) In contrast, Chief Justice McLachlin as well as Justices Arbour, Binnie and Major have dissented more frequently in constitutional cases over this time period, with their dissents overwhelmingly favouring Charter claimants as opposed to government. Certain commentators have already remarked on the fact that the Canadian Supreme Court has given a relatively robust interpretation to the criminal rights guarantees in the Charter.[52] Depending on the attitudes of the two new Court appointees from Quebec, we could well see a shift in the Court's approach even more in the direction of Charter claimants, particularly in criminal rights cases, than has been the case in the past.

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[52] See, for example, Hogg's commentary on the Supreme Court's interpretation of the guarantee against unreasonable search and seizure in s. 8 in *Constitutional Law of Canada* (1997), at s. 45.4.