

## Constitutional Cases 2002: An Overview

Patrick J. Monahan

*Osgoode Hall Law School of York University*

Nadine Blum

Follow this and additional works at: <http://digitalcommons.osgoode.yorku.ca/sclr>



This work is licensed under a [Creative Commons Attribution-Noncommercial-No Derivative Works 4.0 License](https://creativecommons.org/licenses/by-nc-nd/4.0/).

### Citation Information

Monahan, Patrick J. and Blum, Nadine. "Constitutional Cases 2002: An Overview." *The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference* 20. (2003).

<http://digitalcommons.osgoode.yorku.ca/sclr/vol20/iss1/1>

This Article is brought to you for free and open access by the Journals at Osgoode Digital Commons. It has been accepted for inclusion in The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference by an authorized editor of Osgoode Digital Commons.

# CONSTITUTIONAL CASES 2002: AN OVERVIEW

Patrick J. Monahan \*

Nadine Blum \*\*

These two volumes (volumes 20 and 21) of the *Supreme Court Law Review*, which consist of the papers presented at Osgoode Hall Law School's 6th Annual Constitutional Cases Conference held on April 4, 2003, examine the constitutional decisions of the Supreme Court of Canada released in the calendar year 2002.<sup>1</sup> The Court handed down a total of 88 decisions in 2002,<sup>2</sup> 23 (or 26 per cent) of which were constitutional cases.<sup>3</sup> The vast majority of the constitutional cases in 2002 were Charter cases (19/23 cases) with only four federalism cases, one of which (*Kitkatla*) raised significant Aboriginal issues.

It continues to be extremely difficult to get a case before the Supreme Court of Canada. There were just 13 appeals as of right in 2002, the lowest number in the past decade. In terms of applications for leave to appeal, this past year the Court granted leave in just 10 per cent of applications submitted to the Court, as compared with 12 per cent of applications that were successful in 2001 and 13

---

\* Professor of Law and Dean, Osgoode Hall Law School.

\*\* Osgoode Hall Law School, Class 2005.

<sup>1</sup> 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.

<sup>2</sup> Supreme Court of Canada, *Statistics 1992 to 2002: Bulletin of Proceedings: Special Edition*, available at <<http://www.scc-csc.gc.ca>> [hereinafter "*Statistics*"].

<sup>3</sup> The 23 constitutional decisions in calendar year 2002 were as follows: *Ahani v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 2 [hereinafter "*Ahani*"]; *Babcock v. Canada (Attorney General)*, 2002 SCC 57 [hereinafter "*Babcock*"]; *Gosselin v. Quebec (Attorney General)*, 2002 SCC 84 [hereinafter "*Gosselin*"]; *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)* 2002 SCC 31 [hereinafter "*Kitkatla*"]; *Krieger v. Law Society of Alberta*, 2002 SCC 65 [hereinafter "*Krieger*"]; *Lavallee, Rackel & Heintz v. Canada (Attorney General)*; *White, Ottenheimer & Baker v. Canada (Attorney General)*.; *R. v. Fink*, 2002 SCC 61 [hereinafter "*Lavallee*"]; *Lavoie v. Canada*, 2002 SCC 23 [hereinafter "*Lavoie*"]; *Mackin v. New Brunswick (Minister of Finance)*; *Rice v. New Brunswick*, 2002 SCC 13 [hereinafter "*Mackin*"]; *Moreau-Bérubé v. New Brunswick (Judicial Council)*, 2002 SCC 11 [hereinafter "*Moreau-Bérubé*"]; *Nova Scotia (Attorney General) v. Walsh*, 2002 SCC 83 [hereinafter "*Walsh*"]; *Quebec (Attorney General) v. Laroche*, 2002 SCC 72 [hereinafter "*Laroche*"]; *R. v. Fliss*, 2002 SCC 16 [hereinafter "*Fliss*"]; *R. v. Guignard*, 2002 SCC 14 [hereinafter "*Guignard*"]; *R. v. Hall*, 2002 SCC 64 [hereinafter "*Hall*"]; *R. v. Jarvis*, 2002 SCC 73 [hereinafter "*Jarvis*"]; *R. v. Law*, 2002 SCC 10 [hereinafter "*Law*"]; *R. v. Ling*, 2002 SCC 74 [hereinafter "*Ling*"]; *R. v. Noël*, 2002 SCC 67 [hereinafter "*Noël*"]; *Ruby v. Canada (Solicitor General)*, 2002 SCC 75 [hereinafter "*Ruby*"]; *R.W.D.S.U., Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.*, 2002 SCC 8 [hereinafter "*Pepsi*"]; *Sauvé v. Canada (Chief Electoral Officer)*, 2002 SCC 68 [hereinafter "*Sauvé*"]; *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 [hereinafter "*Suresh*"]; *Ward v. Canada (Attorney General)*, 2002 SCC 17 [hereinafter "*Ward*"].

per cent in 2000. This decrease in successful leave applications is even more significant when one considers that there were about 25 per cent fewer applications for leave filed in 2002 (the first time in the past three years when leave applications declined.)<sup>4</sup>

Another trend that has emerged in recent years, and which continued in 2002, is a reduction in the number of appeals heard by the Court. While the Court released 88 judgments in 2002, it heard just 72 appeals in 51 sitting days. Last year the Court also took an average of seven months from the date of hearing to the date of judgment in cases where judgment is reserved, which is a very slight increase from 2001. This suggests a desire on the part of the Court to take sufficient time for reflection and discussion amongst the members of Court on the important appeals that are heard.

While it is always difficult to offer generalizations about the wide variety of constitutional decisions handed down in a given year, a number of significant themes did emerge from the Court's constitutional docket in 2002. First, the Court was extremely receptive to Charter claims in 2002. Over 60 per cent of the Charter claims adjudicated by the Court were successful last year, which is the highest success rate for Charter claimants since 1985. Second, there were unusually sharp divisions amongst members of the Court in Charter cases last year, with at least one member of the Court dissenting in close to 50 per cent of the Court's Charter decisions. This is a departure from the experience in 2001, when the Court was unanimous in about three-quarters of its constitutional decisions. Third, the Court's approach to federalism and Aboriginal cases in 2002 differed markedly from that in Charter cases. In the four federalism and Aboriginal cases handed down in 2002 the Court upheld all of the various statutory provisions that were being challenged, and in each instance the Court was unanimous.

One innovation in our analysis this year is an attempt to identify those decisions which will have the greatest impact on the future development of Charter jurisprudence. We polled the 43 members of the Osgoode Hall Law School's Constitutional Advisory Board, made up of leading academics, practitioners and government lawyers from across the country, for their view as to the most significant constitutional decisions of the year. The results, set out in Table 1 below, indicate a fairly broad consensus that the *Gosselin* case was the most significant constitutional decision of 2002. In *Gosselin* the Court upheld Quebec regulations which had provided lower benefit levels for younger claimants under Quebec's welfare scheme in the 1980s. As is discussed below, what makes *Gosselin* such a significant case is precisely the fact that the claim in the case failed. The issue raised was whether governments are under a

---

<sup>4</sup> See *Statistics*, at 4.

constitutional obligation to provide a minimum level of social benefits to individuals in Canadian society. Had the result gone the other way, and the Court found that governments were under such a positive constitutional obligation, it could potentially have led to a very dramatic increase in the judicial scrutiny applied to social welfare and benefit programs. In effect, the result in *Gosselin* suggests that the Court remains cautious about extending its reach into this area, preferring to leave fairly wide scope for the exercise of discretion by legislatures and governments in their decisions about the design and funding of such programs.

TABLE 1

**Most Significant Constitutional Cases of 2002**

(As selected by Osgoode Hall Law School's  
Constitutional Advisory Board)

| Rank | Case            | Total Votes |
|------|-----------------|-------------|
| 1    | <i>Gosselin</i> | 17          |
| 2    | <i>Sauvé</i>    | 9           |
| 3    | <i>Suresh</i>   | 7           |
| 4    | <i>Jarvis</i>   | 6           |
| 5    | <i>Walsh</i>    | 4           |
|      | <i>Lavallee</i> | 4           |

The other Charter case from 2002 that was regarded as particularly significant by the Constitutional Advisory Board was *Sauvé*. Here the Court, by a narrow 5-4 margin, struck down a provision in the *Canada Elections Act* which denied the right to vote to prisoners who are sentenced to terms of two years or more in a correctional institution. *Sauvé* is significant not only because it involved the invalidation of an important provision in federal law, but also because that provision had been enacted in response to an earlier Court ruling which had invalidated a broader ban on prisoners' voting rights. Thus *Sauvé* provided an opportunity to observe the Court's attitude towards so-called "reply" legislation and the extent to which courts and legislatures can be said to be engaged in a Charter "dialogue." While the Court generally has embraced the "dialogue" metaphor (and all members of the Court in *Sauvé* refer approvingly to it), the deep divisions in *Sauvé* indicate that there is no consensus on the practical implications of this approach to Charter adjudication when it comes to deciding actual cases.

## I. CHARTER CASES

The Court was more receptive to Charter claims in 2002 than in any year since 1985. Charter claims succeeded in 12 of the 19 cases handed down in 2002, a success rate of 63 per cent, which far exceeds the average success rate over the past decade of about 35 per cent (See Table 2 below).<sup>5</sup>

TABLE 2

**Success Rate of Charter Claimants  
Supreme Court of Canada 1991-2002**

| Year         | Charter Challenges | Claimant Succeeds | Success Rate |
|--------------|--------------------|-------------------|--------------|
| 1991         | 35                 | 15                | 43%          |
| 1992         | 38                 | 12                | 32%          |
| 1993         | 42                 | 9                 | 21%          |
| Year         | Charter Challenges | Claimant Succeeds | Success Rate |
| 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                 | 7                 | 44%          |
| 2002         | 19                 | 12                | 63%          |
| <b>TOTAL</b> | <b>310</b>         | <b>108</b>        | <b>35%</b>   |

Six of the successful Charter claims in 2002 involved the invalidation of federal or provincial legislation. Four of the statutes were federal (in *Sauvé*, *Lavallee*, *Hall* and *Ruby*) while two were provincial (in *Mackin* and *Guignard*). Five successful Charter cases involved challenges to government action (*Jarvis*,

<sup>5</sup> 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*.

*Ling, Law, Suresh, and Noël*) while the final successful Charter claim involved a challenge to a common law rule (*Pepsi*).

## 1. Challenges to Legislation

### (a) *The “Dialogue” Between Courts and Legislatures*

The fact that there is an ongoing internal debate amongst members of the Court regarding the appropriate level of deference to be afforded to Parliament was highlighted in the *Sauvé* decision. In this case, a 5-4 majority rejected Parliament’s “reply” legislation that denied the right to vote in federal elections to every person incarcerated in a correctional facility for two or more years. The original legislation, struck down in a 1993 Court decision, had imposed a broader restriction on prisoners’ voting rights, denying the right to vote to all those incarcerated.

The impugned provision, section 51(e) of the *Canada Elections Act*, was challenged on the basis of the right to vote contained in section 3 of the Charter. Chief Justice McLachlin, writing on behalf of a majority consisting of Arbour, Binnie, Iacobucci, and LeBel JJ., refused to adopt a deferential approach in response to Charter “dialogue” and held that the right to vote is a fundamental value of Canadian democracy that cannot be compromised absent a reasonably convincing rationale. The Chief Justice rejected the argument that the Court should defer to Parliament since the impugned provision had been enacted in response to an earlier decision of the Court:

[T]he fact that the challenged denial of the right to vote followed judicial rejection of an even more comprehensive denial, does not mean that the Court should defer to Parliament as part of a “dialogue”. Parliament must ensure that whatever law it passes, at whatever stage of the process, conforms to the Constitution.<sup>6</sup>

However, as Richard Haigh points out in his commentary on this case, the majority decision in *Sauvé* leaves unanswered the question whether any restriction on prisoners’ voting rights will be able to meet the section 1 justification threshold. In Haigh’s words, “If dialogue is to mean anything, the Court should, to the extent possible, expressly indicate whether Parliament is able to restrict prisoners’ voting rights or not.”<sup>7</sup> He also expresses concern that “The lack of direction will almost certainly lead to another round of litigation if the federal government tries to tamper with prisoner voting rights again.”<sup>8</sup> On

---

<sup>6</sup> *Supra*, note 2, at para. 17.

<sup>7</sup> Haigh, “Between Here and There is Better Than Anything Over There: The Morass of *Sauvé v. Canada (Chief Electoral Officer)*” article included in this volume.

<sup>8</sup> *Id.*, at 353.

the other hand, as of August 2003, no such reply legislation has been introduced, which may suggest that the government is prepared to accept the outcome produced by this second round of litigation on prisoners' voting rights.

David Brown argues in his commentary on *Sauvé* that the Court has entrenched a less-deferential approach to section 1 when it comes to the issue of voting rights and thus may have, in effect, elevated the section 3 right to vote to a status above other Charter rights such as section 15(1) or section 7. Brown claims that the majority decision is difficult to reconcile with the oft-repeated view that there is no "hierarchy of rights" under the Charter. In Brown's view, the majority in *Sauvé* seems to suggest that greater scrutiny will be applied to government attempts to justify restrictions on section 3 rights, as compared with rights protected by other Charter provisions.<sup>9</sup> At the same time, it should be recalled that the Court has on numerous occasions applied what appear to be somewhat differing levels of scrutiny to impugned legislation under section 1.<sup>10</sup> Indeed, the 1998 judgment of Bastarache J. in *Thomson Newspapers* attempts to rationalize these differing results and to argue that they reflect a broader set of factors and considerations that are regarded as relevant to the section 1 analysis.<sup>11</sup>

The majority judgment of McLachlin C.J. in *Sauvé* stands in stark contrast to that of the minority, written by Gonthier J. and concurred in by Bastarache, L'Heureux-Dubé, and Major JJ. Justice Gonthier argues that the "dialogue model" necessitates a more deferential approach to Parliament in light of competing values and sociopolitical considerations with which government must contend. Justice Gonthier argues that the governing values are to be determined through a "dialogue" between government and the courts in which Parliament has the last word:

In my view, especially in the context of the case at bar, the heart of the dialogue metaphor is that neither the courts nor Parliament hold a monopoly on the determination of values. Importantly, the dialogue metaphor does not signal a lowering of the section 1 justification standard. It simply suggests that when, after a full and rigorous section 1 analysis, Parliament has satisfied the court that it has established a reasonable limit to a right that is demonstrably justified in a free and democratic society, the dialogue ends; the court lets Parliament have the last word and does not substitute Parliament's reasonable choices with its own.<sup>12</sup>

---

<sup>9</sup> Brown, "Sauvé and Prisoners' Voting Rights: The Death of the Good Citizen?" article included in this volume.

<sup>10</sup> See the discussion of these varying results and approaches to s. 1 in Monahan, *Constitutional Law* (2nd ed., 2002), at 414-22.

<sup>11</sup> *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877.

<sup>12</sup> *Sauvé*, *supra*, note 3, at para. 104.

Justice Gonthier argues that permitting the exercise of the franchise by offenders incarcerated for serious offences undermines the rule of law and civic responsibility, since these offenders have “attacked the stability and order within our community.”<sup>13</sup> Therefore, the minority holds that temporary disenfranchisement of criminals may serve a valid educative purpose in “civic responsibility and respect for the rule of law.”<sup>14</sup> Given that Parliament has made a reasonable choice, Gonthier J. would hold that the Court ought to defer to that decision.

The so-called “dialogue” model, originally proposed by Dean Hogg and Alison Bushell in a path-breaking 1997 article in the *Osgoode Hall Law Journal*<sup>15</sup> and subsequently embraced by the Supreme Court in its 1998 decision in *Vriend*,<sup>16</sup> has now been widely accepted as a useful basis for understanding the Court’s Charter jurisprudence. According to this theory, the Court is engaged in a “dialogue” with legislatures and governments in developing the meaning of the Charter, and the enactment of “reply” legislation following an adverse court ruling is cited by Hogg and Bushell as evidence of the existence of this dialogue. Both the majority and the minority in *Sauvé* refer approvingly to the “dialogue” theory. This suggests that, while the Court may well have embraced the dialogue metaphor in principle, significant divisions remain as to how it is to be applied and its implications in concrete cases that come before the Court.

The issue of the constitutionality of “reply” legislation was also examined in *R. v. Hall*, and here the majority of the Court was ultimately more deferential in its approach. The provision at issue was section 515(10)(c) of the *Criminal Code*,<sup>17</sup> which permitted the denial of bail for the purpose of maintaining “public confidence in the administration of justice” as well as for “any other just cause being shown”. This provision had been enacted by Parliament following *R. v. Morales*,<sup>18</sup> in which an earlier provision (which had permitted the denial of bail “in the public interest”) had been struck down by the Court on grounds that it was unconstitutionally vague.

In *Hall* the Court unanimously found the opening phrase of the “reply” legislation, which allowed the withholding of bail “on any other just cause being shown,” to be invalid on the basis that it conferred an open-ended judicial discretion to deny bail. This was inconsistent with the Charter section 11

---

<sup>13</sup> *Id.*, at para. 114.

<sup>14</sup> *Id.*, at para. 116.

<sup>15</sup> Hogg and Bushell, “The Charter Dialogue between Courts and Legislatures” (1997) 35 *Osgoode Hall L.J.* 97.

<sup>16</sup> *Vriend v. Alberta*, [1998] 1 S.C.R. 493.

<sup>17</sup> R.S.C. 1985, c. C-46.

<sup>18</sup> [1992] 3 S.C.R. 711.

guarantee that an individual will not be denied bail except on the basis of “just cause,” since it is a fundamental principle of justice that an individual cannot be denied bail on the basis of a vague legal provision.<sup>19</sup> However, the Court split 5-4 on the constitutionality of the remainder of the provision, allowing the denial of bail “where the detention is necessary in order to maintain confidence in the administration of justice, having regard to all the circumstances, including the apparent strength of the prosecution’s case, the gravity of the nature of the offence, the circumstances surrounding its commission and the potential for a lengthy term of imprisonment.” The majority judgment, written by McLachlin C.J., and concurred in by L’Heureux-Dubé, Gonthier, Bastarache and Binnie JJ., upheld the remainder of the provision on grounds that the denial of bail for the purposes of maintaining public confidence is a valid objective. Moreover, the majority found that the provision was not unconstitutionally vague since it specifically identified four factors to be taken into account by a judge in exercising this discretion.

The dissent, written by Iacobucci J. for Major, Arbour, and LeBel JJ., would have struck down the entire subsection. In Iacobucci J.’s view, the two other grounds for denying bail included in the *Criminal Code* (namely, public safety and for ensuring attendance in court) were sufficient, making this additional ground unnecessary for the proper functioning of the bail system, as per the test enunciated in *Morales*.

The overall result in *Hall* is consistent with the “vagueness” decisions that have followed *Morales*, in which the Court has demonstrated a reluctance to strike down provisions on grounds that they were unconstitutionally vague. This is particularly so when statutes contemplate the exercise of discretion by the courts. Even in cases where statutes utilize broad and open-ended language, the Court has indicated a willingness to uphold such legislation, provided it sets out some sort of framework for the orderly exercise of judicial discretion.<sup>20</sup>

(b) *The Balance Between Security and Liberty Post 9/11*

Another important theme in the 2002 year was the appropriate balance between the need to maintain collective security in the wake of the terrorist attacks of September 11, 2001, and the potential threat posed by such law enforcement measures to civil liberties. In January 2002, in the companion cases of *Suresh* and *Ahani*,<sup>21</sup> the Court surprised some commentators by upholding provisions in the *Immigration Act* which permitted the Minister to order the deportation of persons who posed a “danger to the security of Canada”

---

<sup>19</sup> *Hall*, *supra*, note 3, at para. 12.

<sup>20</sup> See *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606.

<sup>21</sup> *Supra*, note 3.

even where those persons faced the risk to torture following their deportation.<sup>22</sup> The Court also found that the term “terrorism,” which was used but not defined in the Act, had a sufficiently settled meaning as to permit legal adjudication. At the same time, the Court upheld the statutory provision only on the basis that cases in which deportation to face torture would be justified would be “exceptional.”<sup>23</sup> As such, the Court indicated a willingness to subject legislation impinging on civil liberties in the name of national security to a narrow interpretation, even in the wake of the terrorist attacks of September 11.

In *Lavallee*, released in September 2002, the Court confirmed its willingness to subject law enforcement procedures to significant scrutiny, even at the risk of potentially limited government’s ability to detect and prosecute serious criminal activity. The case arose when law firms had made claims of solicitor-client privilege after materials had been seized from lawyers’ offices pursuant to section 488.1 of the *Criminal Code*. The reasoning in the case is significant since section 488.1, which set out the procedure for determining a claim of solicitor-client privilege in relation to documents seized from a law office under a warrant, parallels similar provisions found in the *Income Tax Act* as well as in the more recently enacted Money Laundering legislation. Section 488.1 required that where an officer examined, copied, or seized any document from a lawyer’s office for which the lawyer had claimed solicitor-client privilege, the officer would seal the documents and place them in custody with local authorities. Within strict time periods, the solicitor, client, or Attorney General could apply to the court for a determination of whether the material was in fact privileged.

Justice Arbour, for the majority (McLachlin C.J., Iacobucci, Major, Bastarache and Binnie JJ. concurring), held that solicitor-client privilege is protected under section 8 of the Charter as part of a client’s fundamental right to privacy. Section 488.1 could not be upheld as it more than minimally impaired solicitor-client privilege. Due to the strict time lines to apply for a determination that the material was privileged, it was possible that documents which would otherwise rightly be deemed as privileged would be disclosed to the state should the client’s lawyer fail to meet the deadline. The provision violated section 8, could not be upheld under section 1, and was invalid.

Another flaw in the legislation was the possibility, as per section 488.1(4)(b), that a judge could allow the Attorney General to examine the documents to assist him or her in deciding whether or not the documents were privileged. These flaws in the legislation, along with others, led the majority to conclude

---

<sup>22</sup> Although on the facts in *Suresh* the Court overturned the Minister’s deportation order, in both *Suresh* and *Ahani* the constitutional validity of the underlying statutory provisions was upheld.

<sup>23</sup> *Suresh*, *supra*, note 3, at para. 78.

that the client's section 8 rights were not adequately protected by section 488.1 and thus the legislation was unreasonable. As commentators Mahmud Jamal and Brian Morgan note, this case is significant because it is the first time solicitor-client privilege has been used to strike down legislation. Further, solicitor-client privilege is now protected under both sections 7 and 8 of the Charter, though *Arbour J.* relied solely on section 8 to strike down the provision.<sup>24</sup>

The Court's ringing endorsement of solicitor-client privilege in *Lavallee* may have contributed to the federal government's subsequent announcement on March 20, 2003, to withdraw money-laundering regulations under the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*<sup>25</sup> which would have required lawyers to report any large cash transactions, terrorist property and suspicious transactions by their clients to a new federal agency.<sup>26</sup> The Canadian Federation of Law Societies had launched a constitutional challenge to the regulations. Despite this reversal, the government has stated that it still intends to bring lawyers into the anti-money laundering and anti-terrorist regulatory scheme. However, as of August 2003, the necessary regulations had not been announced.<sup>27</sup>

(c) *Gosselin and Positive Rights Under the Charter*

In 2002, the case with the most significance for the development of Charter jurisprudence was *Gosselin*, in which the Court upheld an age-based distinction in Quebec's provincial welfare regulations by a narrow 5-4 margin. The Charter issue arose when Louise Gosselin challenged section 29(a) of Quebec's *Regulation Respecting Social Aid [Regulation]* made under the 1984 *Social Aid Act*, which provided for a two-tiered system of welfare benefits: persons under age 30 were entitled to approximately one third of the benefits provided to those over 30. The *Regulation* also provided that persons under 30 could make up the two-thirds reduction through participation in education and work-experience programs. In 1989, this scheme had been repealed and replaced by regulations not based on age. Louise Gosselin brought a claim on behalf of

---

<sup>24</sup> Jamal and Morgan, "The Constitutionalization of Solicitor-Client Privilege" article included in this volume.

<sup>25</sup> S.C. 2001, c. 17.

<sup>26</sup> *The Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, S.C. 2000, c. 17 — published in Part I of the *Canada Gazette* on June 22, 2002.

<sup>27</sup> "Lawyers Removed From Proceeds of Crime Reporting Requirements" (25 March 2003) online: Continuing Legal Education Society of British Columbia <<http://www.cle.bc.ca/CLE/Stay+Current/Collection/2003/3/03-fedleg-pcmltfarepeal.htm>> (date accessed: 14 August 2003).

some 75,000 welfare claimants under age 30 who had received reduced welfare benefits during the 1987 to 1989 period, seeking a declaration that the age distinction in the *Regulation* was invalid and that, therefore, the members of the class should be reimbursed for the benefit reduction arising from the fact that they were at that time under age 30.

Ms. Gosselin's Charter claim was based both on section 15 (on the theory that the distinction between those over 30 versus those under 30 was inconsistent with section 15's guarantee against age discrimination) as well as on the basis of section 7 (on the theory that the guarantee of life, liberty and security of the person provides a positive obligation on the state to provide a minimum level of social benefits to needy individuals.) Both claims were rejected, the section 7 claim by a substantial 7-2 margin and the section 15 claim by a narrow 5-4 margin.

The *Gosselin* case is mainly significant for the Court's analysis of the claim that section 7 of the Charter places positive obligations on the state to protect life, liberty and security of the person. Writing for the majority, McLachlin C.J. (for Gonthier, Iacobucci, Major, Bastarache, Binnie and LeBel JJ.), held that section 29(a) of the *Regulation* did not infringe section 7 of the Charter. The claim that the appellant's section 7 Charter rights were infringed was based on three claims: first, that economic rights are protected by the right to life, liberty and security of the person; second, that a failure to provide adequate benefits constitutes a "deprivation" by the state; and third, that the "deprivation" at issue was not in accordance with the principles of fundamental justice. Chief Justice McLachlin reviewed the jurisprudence on section 7 and found that the purpose of section 7 is to protect life, liberty, and security of the person from deprivations that occur as a result of an individual's interaction with the administration of justice. In this case, the administration of justice was not plainly implicated. While not ruling out the possibility that the interpretation of section 7 could evolve incrementally to encompass deprivations occurring outside of the context of the administration of justice, McLachlin C.J. found that a larger hurdle to the section 7 argument was the fact that jurisprudence does not suggest that section 7 places positive obligations on the state. Rather, section 7 has been interpreted as restricting the state's ability to deprive people of life, liberty and security of the person. Such a deprivation, she found, did not exist in the case at bar. Again, while refusing to rule out the possibility that positive obligations on the state to sustain life, liberty or security of the person could potentially be made out in special circumstances in a future case, McLachlin C.J. held that this novel argument could not be accepted on the facts before the Court.

The contrary argument — that there is a substantive and affirmative right to the provision of economic support by government — was set forth in *Arbour J.'s* dissent (joined by L'Heureux-Dubé J.) which concluded "that the section 7

rights to ‘life, liberty and security of the person’ include a positive dimension.”<sup>28</sup> Justice Arbour’s dissent argues for a broad interpretation of section 7:

Whereas the course of section 7 jurisprudence may have once supported a legalistic reliance on the subheading “Legal Rights” as a way of delimiting the scope of section 7 protection, the more recent turn in section 7 jurisprudence indicates that this interpretive device has been supplanted by a purposive and contextual approach to the recognition of constitutionally protected rights.<sup>29</sup>

Justice Arbour then sets forth a novel “two rights theory” of section 7. In so doing, she rejects the “general impression” that the first clause in section 7, the right to life, liberty and security of the person, is guaranteed, but only against deprivations which violate principles of fundamental justice, as set out in the second clause.<sup>30</sup> Rather, Arbour J. argues, the fact that “the section’s first clause affords some additional protection seems, as a purely textual matter, beyond reasonable objection.”<sup>31</sup> In her view, therefore, it should not be necessary to demonstrate that there has been a positive “deprivation” by the state of a protected interest (nor that such deprivation be contrary to the principles of fundamental justice) in order to found a section 7 claim.

This interpretation of section 7 is a departure from the previously settled interpretation of the provision which suggested that it conferred one right, namely, the right not to be deprived of life, liberty or security of the person except in accordance with the principles of fundamental justice. This settled approach to section 7 has been assumed by the Supreme Court in all cases involving the provision over the past decade, since the Court has consistently required not only that there be a deprivation of a protected section 7 right but also that such deprivation be contrary to the principles of fundamental justice before there can be a breach of section 7.<sup>32</sup> In *Gosselin* Arbour J. argued, in contrast, that this established interpretation of section 7 as a one-right guarantee

---

<sup>28</sup> *Gosselin*, *supra*, note 3, at para. 308.

<sup>29</sup> *Id.*, at para. 316.

<sup>30</sup> *Id.*, at para. 339.

<sup>31</sup> *Id.*, at para. 340.

<sup>32</sup> For example, in *Winnipeg Child and Family Services v. K.L.W.*, [2000] 2 S.C.R. 519, the majority of the Court found that the warrantless apprehension of a child deemed to be in need of protection was a breach of the parents’ security of the person, but that this deprivation was consistent with the principles of fundamental justice; therefore, there was no breach of s. 7. Although Arbour J. dissented in *Winnipeg Child and Family*, her dissent seemed to assume that in order to find a breach of s. 7 it was necessary to find not only a deprivation of security of the person but also that this deprivation was contrary to the principles of fundamental justice; where Arbour J. differed from the majority was in her conclusion that the warrantless apprehension was in fact contrary to the principles of fundamental justice and therefore contrary to s. 7.

had been developed based on an “impression” that this was the correct interpretation. In her view, the Court had never explicitly ruled on the correct approach to section 7.<sup>33</sup> Further, Arbour J. cited a number of cases to support her positive rights theory, including *Dunmore*,<sup>34</sup> where the Court imposed a positive obligation on the province of Ontario to guarantee the right of association to agricultural workers.

As pointed out by Jamie Cameron elsewhere in this volume,<sup>35</sup> Arbour J.’s analysis returned to the plain text of section 7 as a means of overcoming the “doctrinal constraints” on section 7’s interpretation. Yet these doctrinal constraints were themselves grounded in a deeper and important respect for the institutional boundaries between courts and legislatures. If all that is necessary to establish a breach of section 7 is a deprivation of “liberty” or “security of the person,” the scope of the provision is exceptionally broad and would subject a huge variety of government legislation and regulation to judicial scrutiny under section 1. The established approach to section 7, one endorsed by the majority in *Gosselin*, seeks to give a substantive interpretation to the provision while at the same time respecting institutional boundaries by confining its content to the administration of justice. In Professor Cameron’s view, one troubling aspect of Arbour J.’s analysis is that she “disregards the question of boundaries on review.” In fact, Cameron argues that throughout the entire *Gosselin* decision, where issues of institutional competence should have been at the forefront, such issues were largely ignored which, in her view, “can only place the legitimacy of [judicial] review at risk.”<sup>36</sup>

Although the section 7 claim in *Gosselin* failed by a substantial 7-2 margin, 6 of the 7 members of the majority refused to rule out the possibility that section 7 could impose positive obligations on the state in a future case. This leaves it open to litigants in future cases to advance similar positive rights claims, which will inevitably work their way back up to the country’s highest Court for consideration. It remains to be seen whether a future Court will, if at all, deal with the important institutional considerations at stake in the imposition of positive social benefit obligations on the state.

---

<sup>33</sup> There is some support for this view in the judgment of Lamer J. (as he then was) in the *Reference re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, at 500, where he had expressly left open the issue of whether s. 7 consisted of one right or two. However his analysis of the “principles of fundamental justice” in that case only has meaning if one assumes that it is necessary, in order to make out a s. 7 claim, to find a breach of the principles of fundamental justice; as noted above, subsequent cases has proceeded on this basis.

<sup>34</sup> *Dunmore v. Ontario (Attorney General)*, [2001] 3 S.C.R. 1016 [hereinafter “*Dunmore*”].

<sup>35</sup> Cameron, “Positive Obligations under Sections 15 and 7 of the Charter: A Comment on *Gosselin v. Québec*” article included in this volume.

<sup>36</sup> *Id.*, at 65.

With respect to section 15(1), the claim failed because, according to the majority, there was no “discrimination,” which is a necessary element to a section 15 claim. The section 15 debate between McLachlin C.J. and Bastarache J. (who wrote the lead dissenting decision on this issue) revolved around the question of whether the *Regulation* resulted in a violation of the “human dignity” of welfare recipients under 30 years of age.

Chief Justice McLachlin’s analysis focused on the four contextual factors for establishing discrimination and violation of human dignity that were originally identified in the 1999 *Law* decision.<sup>37</sup> The Chief Justice found that none of these contextual factors led to the conclusion that the age distinction in the *Regulation* violated the claimant’s human dignity.

First, McLachlin C.J. rejected the claim that members of the complainant group suffered from pre-existing disadvantage, arguing that “[i]f anything, people under 30 appear to be advantaged over older people in finding employment.”<sup>38</sup> Second, she held that the evidence indicated a correspondence between the scheme and the actual circumstances of welfare recipients under 30 in cases where younger welfare recipients specifically lacked certain skills required to get permanent jobs. In providing that younger recipients who participated in education and skills program would receive increased benefits, the government was implicitly recognizing the potential of youth by encouraging them to participate in such programs. The third factor, regarding the “ameliorative purpose,” was found to be neutral, since the scheme was not designed to improve the conditions of another group. Finally, McLachlin C.J. held that the findings of the trial judge and the evidence did not support the view that the overall impact on the affected individuals undermined their human dignity. In fact she concludes the opposite: “In my view, the interest promoted by the differential treatment at issue in this case is intimately and inextricably linked to the essential human dignity that animates the equality guarantee set out at section 15(1) of the Canadian Charter.”<sup>39</sup>

Justice Bastarache, in contrast, felt that age is an immutable personal characteristic falling squarely within the section 15 principle that people should not be penalized for something they cannot change. While McLachlin C.J. rejected the claimant’s assertion that she should be compared to *welfare* recipients over 30 (with the Chief Justice holding that the appropriate comparators were *people* under age 30 versus those over 30), Bastarache J. argued that contextual analysis required a consideration of the specific position

---

<sup>37</sup> *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497 [hereinafter “*Law*”].

<sup>38</sup> *Gosselin*, *supra*, note 3, at para. 34.

<sup>39</sup> *Id.*, at para. 65.

of young welfare recipients. He asks rhetorically, “If the vulnerability of the appellant’s group as welfare recipients cannot be recognized at this stage, can we really be said to be undertaking a contextual analysis?”<sup>40</sup>

The discussion of section 15(1) in *Gosselin* is just one more page in the continuing saga of tortuous equality analysis at the Supreme Court. While all members of the Court continue to embrace the framework for section 15 set forth in *Law*, there are significant divisions as to how that analysis should be applied in particular cases. Moreover, as various commentators have observed, the contextual factors identified in *Law* are highly abstract and open-ended, meaning that it is extremely difficult to predict how they will be applied in future cases. Further, the line between section 15(1) and section 1 justification analysis continues to become ever-more obscured, with many of the contextual factors in *Law* seemingly identical to the kinds of considerations that would normally be regarded as relevant under section 1. This tendency to incorporate justification analysis into section 15(1) is worrying because it may make it increasingly difficult as well as unpredictable for claimants to establish a *prima facie* breach of their Charter equality rights.

This obstacle standing in the way of establishing even a *prima facie* breach of section 15 is reflected in the fact that there was only one partially successful section 15 claim at the Supreme Court in 2002: in *Lavoie* a hiring preference for citizens in the federal public service was held to violate section 15 by seven out of nine judges, but was upheld under section 1 by six of the nine. Contrast this with the result in *Walsh*, where the Court found that the exclusion of opposite-sex cohabiting couples from the *Matrimonial Property Act*<sup>41</sup> was not discrimination as it does not affect the dignity or deny access to benefits or advantages available to married persons. What these cases indicate is that the task of establishing a breach of section 15 continues to be a significant hurdle for claimants to overcome, which seems a somewhat ironic legacy of the *Andrews* case,<sup>42</sup> the first section 15 case decided by the Supreme Court of Canada and one which had called for a robust interpretation of section 15.

(d) *Other Challenges to Legislation in 2002*

Two challenges to provincial legislation were successful in 2002. In *Mackin*, provincial legislation abolishing supernumerary judges was struck down on grounds that it infringed guarantees of judicial independence; however the claimants’ damages claim was dismissed. In *Guignard*, a municipal bylaw

---

<sup>40</sup> *Id.*, at para. 238.

<sup>41</sup> R.S.N.S. 1989, c. 275, s. 2(g).

<sup>42</sup> *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143.

prohibiting advertising signs was found to be unconstitutional as an unjustified infringement of freedom of expression under section 2(b) of the Charter, with the declaration of invalidity suspended for six months.

Other challenges to legislation in 2002 included *Moreau-Bérubé*,<sup>43</sup> *Suresh* (which, as noted above, involved a challenge to legislation as well as to government action), and *Ruby*. In *Moreau-Bérubé* the Court, led by Arbour J., unanimously rejected the Charter claim that the procedure for sanctioning the misconduct of a provincial court judge, as provided for under the New Brunswick *Provincial Court Act*, violated the principle of judicial independence. The Court emphasized the fact that the alleged misconduct was reviewed by a council composed primarily of judges, who would be sensitive to the delicate balance between judicial independence and judicial integrity. In *Suresh*, the Court unanimously rejected the claim that statutory provisions in the *Immigration Act* allowing the deportation of a refugee facing risk of torture were contrary to section 7 of the Charter. However, the Court also ruled that in exercising the discretion conferred by section 53(1)(b) of the *Immigration Act*, the Minister must conform to the principles of fundamental justice under section 7. The Minister's decision to order the deportation of Suresh was held to be inconsistent with section 7, on the basis that the Minister had failed to adequately consider the risk of torture in making the deportation decision.

The claimant in *Ruby*, on the other hand, was successful in part in challenging provisions of the *Privacy Act* on the basis of sections 7 and 2(b) of the Charter. The provisions in question, section 52(2)(a) and (3), required *in camera* hearings and *ex parte* representations when the government denied an applicant's request for access to personal information on the grounds of national security or maintenance of foreign confidences. The claimant's section 7 claim was unanimously rejected; Arbour J. ruled that *ex parte* submissions by government were not contrary to section 7 as fairness is ensured through procedural safeguards and rights of appeal. However, section 2(b) (freedom of expression including the freedom to hear and read information relating to government and the court system) was found to be violated by the mandatory *in camera* hearings and this violation failed the proportionality test under section 1; the provision required the whole hearing (not just the parts of the evidence covered by the exemptions) to be held *in camera*. The Court read down section 51(2)(a) to apply only to *ex parte* submissions mandated by section 51(3).

---

<sup>43</sup> This case does not expressly address a constitutional provision, but considers whether the statutory provisions are sufficient to protect judicial independence. Judicial independence is protected by s. 11(b) of the Charter and by the preamble to the *Constitution Act, 1867*.

## 2. Challenges to Government Action

A number of cases involving challenges to government action (as distinct from challenges to legislation), and arising in the criminal context, brought to light significant issues with respect to privacy, the right to protection from the state from unreasonable search and seizure, and the manner in which personal information is transmitted from one arm of government to another. In *Ling* and *Jarvis*, heard concurrently by the Court, at issue was whether the use of evidence obtained during an audit pursuant to sections 231.1(1) and 231.2(1) of the *Income Tax Act* to further investigate offences under section 239(1)<sup>44</sup> violates the taxpayer's Charter rights. The Court, in a unanimous decision written by Iacobucci and Major JJ., held that once the "predominant purpose" of the investigation shifted from a routine audit to the determination of a taxpayer's penal liability under section 239, a warrant was required in order for the search to be in compliance with Charter rights. This ruling resulted in the exclusion of some evidence in *Jarvis* and the ordering of a new trial to determine the admissibility of some evidence in *Ling*. Similarly in *Law*, photocopied documents, obtained from a safe recovered by the police and forwarded to tax authorities, were excluded as evidence. Justice Bastarache, once again for a unanimous Court, held that the fact that the safe was stolen property did not support the inference that the owner had relinquished his or her section 8 expectation of privacy in such property; evidence obtained from the recovered safe was thus excluded under section 24(2).

These decisions have been praised by some for the Court's protection of an accused's right to privacy. One commentator said in response to the *Jarvis* decision, "The Court has affirmed the robust constitutional protection of privacy over information under section 8 of the Charter and imposed limits on regulators in the context of investigating regulatory offences."<sup>45</sup> However, Robert Frater of the Department of Justice Canada has expressed concern that the requirement that auditors obtain a warrant once the "predominant purpose" shifts to penal investigation may have the effect of *encouraging* prosecution. This is because investigators will be encouraged to constantly reassess the nature of their investigation and to obtain a warrant earlier in investigations in order to avoid the possibility of a court ruling to exclude evidence, should it find the investigation to be "penal."<sup>46</sup> If Frater's prediction proves accurate, it

---

<sup>44</sup> The offences were tax evasion and making false or deceptive statements in tax returns.

<sup>45</sup> Comments by Brian G. Morgan, personal communication as part of his commentary on 2002 Constitutional decisions.

<sup>46</sup> Frater, "Should the Left Hand Get What the Right Hand's Got?: Government Information Sharing, Criminal Investigation and Privacy Rights" article included in this volume.

could once again demonstrate the fact that judicial decisions often produce unintended and unforeseen consequences.

Other challenges to government action included *Fliss* and *Nöel*. In *Fliss*, an accused had freely confessed to an undercover police officer that he had killed a woman and the conversation was surreptitiously recorded by the officer. While the taping had been judicially authorized, the trial judge found that the authorization ought to have been refused for insufficiency of evidence and the taped confession was therefore inadmissible. However the undercover police officer was allowed to testify at trial, and to review the transcript of the confession in order to refresh his memory. The Supreme Court of Canada found that using the transcript in this manner violated section 8, since the result was that the officer was able to testify to matters which he otherwise would have forgotten. Despite the violation of section 8, the Supreme Court found that this did not affect the fairness of the trial. Therefore it was appropriate to admit the testimony under section 24(2) of the Charter, since this result would not bring the administration of justice into disrepute.

In *Nöel*, the appellant, who was charged with murder, had testified at his trial. In its cross-examination of the accused, the Crown had relied on inconsistent testimony he had offered at the earlier trial of his brother, who had been charged with the same murder and been acquitted. The Court held that, while it was appropriate for the Crown to utilize the earlier testimony of the accused on cross-examination for the purpose of testing his credibility, the Crown had gone further and attempted to have the accused actually adopt incriminating portions of his earlier testimony. This was held by the Court to be contrary to protection against self incrimination in section 13 of the Charter, as well as inconsistent with section 5 of the *Canada Evidence Act*,<sup>47</sup> and a new trial was ordered.

## II. FEDERALISM/ABORIGINAL CASES IN 2002

The federalism docket in 2002 continues to reflect the shift away from division of powers adjudication towards Charter issues. In the four federalism cases decided by the Supreme Court of Canada in 2002, the Court was unanimous on each occasion: *Babcock* (ruling that section 39 of the *Canada Evidence Act*, which exempts Cabinet confidences from disclosure does not invade the core jurisdiction of superior courts), *Kitkatla* (upholding provisions of the *British Columbia Heritage Conservation Act*, allowing the regulation of Aboriginal artifacts, as valid provincial legislation), *Kreiger* (upholding rule 28(d) of the *Alberta Code of Professional Conduct*, requiring prosecutors to

---

<sup>47</sup> The accused had claimed the benefit of s. 5 of the *Canada Evidence Act* when he had testified at his brother's trial.

make timely disclosure of evidence, on the basis that such regulation does not invade the scheme of federal criminal law and procedure), and *Ward* (upholding federal regulations which prohibit the sale or barter of young harp seals or hooded seals on the basis of the federal fisheries power in section 91(13), but not on the basis of the criminal law power in section 91(27).)

The only real surprise in these cases arose in *Ward*, where the Court, in a decision written by McLachlin C.J., indicated that section 27 of the federal *Marine Mammal Regulations*<sup>48</sup> could be upheld under the fisheries power in section 91(13) of the *Constitution Act, 1867*, but not under the section 91(27) criminal law power. *Ward* was charged with selling hooded seal pelts contrary to section 27. He challenged the prohibition on the ground that it was an attempt by Parliament to regulate local trade. In rejecting the challenge, the Court held that Parliament's objective was to eliminate commercial hunting of these seals by prohibiting their sale, which would decrease the incentive to hunt them. While the provisions regulated the sale or barter of pelts, the pith and substance of the legislation was not related to property or civil rights but rather to the regulation of fisheries. However, the Court went on to conclude, in *obiter*, that while section 27 had both a prohibition and a penalty, no valid criminal law purpose had been established as "Public peace, order, security and morality played no direct role in its adoption."<sup>49</sup>

This holding is significant since, in a series of cases decided over the past decade, the Court had given an extremely broad interpretation to the criminal law power.<sup>50</sup> *Ward* represents the first case in recent years in which the Court has expressly rejected a federal attempt to justify legislation on the basis of the criminal law power. At the same time, the Court's apparent willingness to impose some limits on the criminal law power had been signaled in the *Firearms Reference*<sup>51</sup> where the Court, despite upholding the impugned legislation in that case, noted that the criminal law power "is not unlimited" and cited with seeming approval concerns identified in the minority dissenting judgment in the 1997 *Hydro-Quebec* decision.<sup>52</sup>

While none of the decisions rendered in 2002 dealt directly with Aboriginal or treaty rights, the *Kitkatla* decision clarifies certain important aspects of the

---

<sup>48</sup> Section 27 of the regulations prohibited the sale, trade or barter of young hooded or harp seals.

<sup>49</sup> *Ward*, *supra*, note 3, para. 55.

<sup>50</sup> See the discussion of these cases in Monahan, *Constitutional Law*, at 332-43.

<sup>51</sup> *Reference re Firearms Act (Can.)*, [2000] 1 S.C.R. 783.

<sup>52</sup> *R. v. Hydro-Québec*, [1997] 3 S.C.R. 213. Here the Court had upheld federal regulation of toxic substances over the objections of Lamer C.J. and Iacobucci J., who regarded the provisions as largely regulatory rather than criminal. The Court in the *Firearms Reference* cited the *Hydro-Quebec* dissent with approval, while at the same time distinguishing the legislation at issue in the *Firearms Reference* as being genuinely within the domain of criminal law.

application of provincial laws to Aboriginal peoples. The case concerned a constitutional challenge brought by the Kitkatla band to the application of British Columbia legislation, the *Heritage Conservation Act* (HCA), to culturally modified trees. According to the Ministry of Small Business, Tourism and Culture, “CMTs are trees which bear the marks of past Aboriginal intervention occurring as part of traditional Aboriginal use.”<sup>53</sup> The claimants argued that sections 12(2)(a), (c) and (d) of the HCA were *ultra vires* the province as they referred explicitly to Aboriginal peoples, providing specifically for the protection as well as destruction of Aboriginal artifacts. In the alternative, they argued that the provisions touched upon the core of Indianness and could not apply of their own force and, moreover, could not be saved by section 88 of the *Indian Act* because they were not laws of general application.<sup>54</sup>

Justice LeBel held that the provisions of the HCA were properly within the jurisdiction of “Property and Civil Rights” of the province, and were laws of “general application” pursuant to section 88 of the *Indian Act*. In defending the position that the laws are not inconsistent with the *Indian Act*, LeBel J. argues that the impugned provisions neither single out Aboriginal peoples nor impair their status or condition as Indians as they applied equally to all citizens of British Columbia and all heritage objects and sites, and struck an appropriate balance between native and non-native interests. Second, LeBel J. decided that the provisions of the HCA did not “affect the essential and distinctive core values of Indianness which would engage the federal power over native affairs and First Nations in Canada,”<sup>55</sup> though they might have graver consequences for Aboriginals.

*Kitkatla* clarifies the fact that, even where a provincial law makes express reference to Aboriginal peoples or matters, it may still qualify as a “law of general application” and apply to Aboriginal peoples through the operation of section 88 of the *Indian Act*. The Court was undoubtedly influenced by the fact that the predominant purpose of the legislation was to preserve and protect Aboriginal cultural artifacts.

Commenting on the *Kitkatla* decision, Jean Leclair argues that “Indianness appears to have been confined to *established* Aboriginal and treaty rights.” Therefore, according to Leclair, the Court was able to uphold the Act by holding that “Aboriginal rights not meeting the established Aboriginal and treaty rights test, as laid out in *R. v. Sparrow* had a double aspect” and,

---

<sup>53</sup> *Kitkatla*, *supra*, note 3, at para. 48.

<sup>54</sup> Section 88 provides that, subject to the terms of any treaty or other Act of Parliament, all laws of general application in force in a province are applicable to Indians unless they are inconsistent with the *Indian Act*.

<sup>55</sup> *Kitkatla*, *supra*, note 3, at para. 75.

therefore, the validity of the Act could be addressed “through the more familiar test of the aspect doctrine.”<sup>56</sup> In his assessment, Kent McNeil suggest that *Kitkatla* should be cause for concern for Aboriginal peoples because it seems to indicate that the Supreme Court of Canada generally “favours the application of provincial laws ... unless good reasons supported by evidence can be provided to show why those laws should not apply in particular circumstances.”<sup>57</sup>

One federalism case in 2002 that raised significant issues outside of the Aboriginal context was *Krieger*. The *Krieger* case arose when an Albertan Crown Attorney, K, failed to make timely disclosure of evidence to defence counsel. The accused complained to the Law Society of Alberta. K sought an order that the Law Society had no jurisdiction to review a Crown prosecutor’s exercise of prosecutorial discretion, as this was a matter falling within the federal government’s jurisdiction over criminal law and procedure. Justices Iacobucci and Major, for the majority, ruled that the disclosure of relevant evidence is a legal duty not falling within the realm of prosecutorial discretion. The Law Society has the power, pursuant to the provincial *Legal Profession Act*, to investigate allegations of ethical misconduct if it is believed that the Crown prosecutor may have acted dishonestly or in bad faith in his or her failure to disclose relevant evidence. Therefore, the rule in question is *intra vires* provincial power under the provincial jurisdiction over the administration of justice.

As noted by authors Lori Sterling and Heather Mackay,<sup>58</sup> the *Krieger* decision is important because the Court explicitly recognized that the independence of the Attorney General in the exercise of prosecutorial discretion has its foundation in the Constitution. Iacobucci and Major JJ. write:

It is a constitutional principle that the Attorneys General of this country must act independently of partisan concerns when exercising their delegated sovereign authority to initiate, continue or terminate prosecutions. So long as they are made honestly and in good faith, prosecutorial decisions related to this authority are protected by the doctrine of prosecutorial discretion.<sup>59</sup>

Thus, according to Sterling and Mackay, the Supreme Court of Canada demonstrated deference to decisions made by prosecutors such that “only a

---

<sup>56</sup> Leclair, “The *Kitkatla* Decision: Finding Jurisdictional Room to Justify Provincial Regulation of Aboriginal Matters” article included in (2003) 21 Sup. Ct. L. Rev. (2d).

<sup>57</sup> McNeil, “Culturally Modified Trees, Indian Reserves, and the Crown’s Fiduciary Obligations” article included in (2003) 21 Sup. Ct. L. Rev. (2d).

<sup>58</sup> Sterling and MacKay “Constitutional Recognition of the Role of the Attorney General in Criminal Prosecutions: *Krieger v. Law Society of Alberta*” at 169, article included in this volume.

<sup>59</sup> *Krieger*, *supra*, note 3, at para. 3.

very limited range of cases can properly be brought before a provincial law society, namely where the prosecutor has acted dishonestly or in bad faith.”<sup>60</sup>

### III. UNANIMITY AND DISSENT ON THE SUPREME COURT OF CANADA IN 2002

In last year’s review of the Court’s constitutional decisions from the 2001 calendar year, it was noted that the Court had been unanimous in approximately three quarters of its constitutional decisions, a relatively high unanimity rate yet one consistent with historical patterns. (See Table 3 below.) This year saw a reversal of that trend, with the Court handing down unanimous decisions in 14 (or 61 per cent) of the year’s 23 constitutional decisions. The decrease in unanimity is the result of unusually sharp divisions in Charter cases in which dissenting judgments were written in nine of the 19 Charter cases; in contrast the four Aboriginal and federalism cases in 2002 were unanimous.

TABLE 3

**Unanimous versus Split Decisions  
In all Constitutional Cases 1995-2002  
(Includes Federalism, Aboriginal and Charter)**

| Year | Unanimous | Split | Percentage Unanimous |
|------|-----------|-------|----------------------|
| 1995 | 17        | 9     | 65%                  |
| 1996 | 28        | 10    | 74%                  |
| 1997 | 14        | 8     | 64%                  |
| 1998 | 12        | 9     | 57%                  |
| 1999 | 11        | 7     | 61%                  |
| 2000 | 8         | 4     | 67%                  |
| 2001 | 14        | 5     | 74%                  |
| 2002 | 14        | 9     | 61%                  |

For some commentators, the trend towards greater division in 2002 in Charter cases is a cause for concern. For example, Richard Haigh<sup>61</sup> remarks that the low unanimity rate of the Court, combined with what he perceives to be the

<sup>60</sup> Sterling and Mackay, *supra*, note 58, at 195.

<sup>61</sup> Haigh, “Between Here and There is Better Than Anything Over There: The Morass of *Sauvé v. Canada (Chief Electoral Officer)*” article included in this volume.

Court's increased use of sarcasm and personalized rhetoric, connotes increasing frustration and worrisome political and ideological divisions within the Court.

Turning to a consideration of the tendencies of individual members of the Court, in the three years since Beverley McLachlin was appointed Chief Justice the most frequent dissenters in constitutional cases have been L'Heureux-Dubé and Arbour JJ. (see Table 4 below). Justice Arbour's eight dissents have all favoured the Charter claimant and have involved a variety of Charter claims. Justice L'Heureux-Dubé dissented three times in favour of the claimant (all in section 15 cases) and four times in favour of the government (all involving legal rights claims). The members of the Court who dissented the least frequently during this period have been Gonthier J. (three dissents, all in favour of the government), Iacobucci J. (four dissents, all in favour of the claimants) and Bastarache J. (four dissents, equally divided).

TABLE 4

**Dissents in Constitutional Cases on the McLachlin Court  
January 1, 2000 – December 31, 2002**

| Justice           | Dissents<br>(Dissents<br>Authored) | Direction of Dissent –<br>favoured<br>Claim/Challenge | Direction of Dissent<br>– Opposed<br>Claim/Challenge |
|-------------------|------------------------------------|---|--|
| McLachlin C.J.    | 6                                  | 5   | 1  |
| L'Heureux-Dubé J. | 7                                  | 3   | 4  |
| Gonthier J.       | 3                                  | 0   | 3  |
| Iacobucci J.      | 4                                  | 4   | 0  |
| Major J.          | 6                                  | 4   | 2  |
| Bastarache J.     | 4                                  | 2   | 2  |
| Binnie J.         | 5                                  | 4   | 1  |
| Arbour J.         | 8                                  | 8   | 0  |
| LeBel J.          | 6                                  | 4   | 2  |
| <b>Totals</b>     | <b>49</b>                          | <b>34</b>   | <b>15</b>  |

**IV. CONCLUSION — THE GROWING DEBATE  
OVER JUDICIAL ACTIVISM**

The debate over the judicial activism versus restraint, which has emerged as a significant political issue in recent years, has gained significant momentum in the past year. In large part this was a product of the June 2003 decision of the

Ontario Court of Appeal in *Halpern v. Canada (Attorney General)*,<sup>62</sup> ruling that the common law definition of marriage as the union of a man and woman to the exclusion of all others was unconstitutional. This decision has generated significant controversy, with some critics claiming that it demonstrates that the judiciary has inappropriately usurped the role of legislatures and governments in the development of public policy.

One question that arises is whether the recent changes in the membership of the Court resulting from the retirements of L'Heureux-Dubé and Gonthier JJ. will produce a shift of the Court's approach to the Charter. As Table 4 indicates, these two justices were relatively more likely to support governments as opposed to Charter claimants in divided legal rights cases (*i.e.*, those arising under sections 7-14 of the Charter). This might suggest that their departure will produce an even greater tendency on the part of the Supreme Court to support Charter claimants as opposed to legislatures and governments in these kinds of cases. On the other hand, L'Heureux-Dubé J. was one of the strongest proponents of equality rights on the Court, consistently siding with equality-seeking groups in section 15 cases. It is unclear whether any of the other members of the Court will carry on with this legacy now that she has retired.

In short, the effects produced by the recent membership changes on the Court defy easy prediction. Indeed, one constant with the Supreme Court is that the institution typically defies the predictions and expectations of even the closest observers. The Court has also demonstrated the capacity to shift ground in the face of significant public controversy, as evidenced by the two rather conflicting *Marshall* decisions handed down in the fall of 2001. One thing that has become clear in recent years, as reflected in the Court's deft handling of politically controversial issues such as Quebec secession or the firearms debate, is that the Court is a savvy political as well as a legal institution. As such, it can be expected that the Court will be sensitive to the public debate that has emerged over its role, and that this political debate will subtly but surely shape and condition its approach to the Charter in the future.

---

<sup>62</sup> [2003] O.J. No. 2268.

## Cases

|   |               |
|---|---------------|
| <i>Ahani v. Canada (Minister of Citizenship and Immigration)</i> .....                                      | 11, 12        |
| <i>Andrews</i> .....  | 19            |
| <i>Babcock v. Canada (Attorney General)</i> .....   | 23            |
| <i>Dunmore</i> .....  | 16            |
| <i>Firearms Reference</i> .....   | 24            |
| <i>Hall</i> .....   | 7, 10         |
| <i>Halpern v. Canada (Attorney General)</i> .....   | 29            |
| <i>Hydro-Quebec</i> .....   | 24            |
| <i>Jarvis</i> .....   | 5, 7, 21      |
| <i>Kiitkala Band v. British Columbia (Minister of Small Business, Tourism and Culture)</i> 4, 23,<br>24, 25 |               |
| <i>Kreiger</i> .....  | 23            |
| <i>Krieger v. Law Society of Alberta</i> .....  | 25, 26        |
| <i>Laroche</i> .....  | 3             |
| <i>Lavallee</i> .....   | 5, 7, 12, 13  |
| <i>Lavoie v. Canada</i> .....   | 19            |
| <i>Law</i> .....  | 7, 17, 19, 21 |
| <i>Law v. Canada (Minister of Employment and Immigration)</i> .....   | 17            |
| <i>Mackin v. New Brunswick (Minister of Finance); Rice v. New Brunswick</i> .....                           | 3             |
| <i>Marshall</i> .....   | 29            |
| <i>Moreau-Bérubé v. New Brunswick (Judicial Council)</i> .....  | 20            |
| <i>Nöel</i> .....   | 22            |
| <i>R. v. Fliss</i> .....  | 22            |
| <i>R. v. Guignard</i> .....   | 7, 19         |
| <i>R. v. Hall</i> .....   | 10            |
| <i>R. v. Hydro-Quebec</i> .....   | 24            |
| <i>R. v. Law</i> .....  | 3             |
| <i>R. v. Ling</i> .....   | 7, 21         |
| <i>R. v. Morales</i> .....  | 10, 11        |
| <i>R. v. Noël</i> .....   | 7             |

|   |                   |
|---|-------------------|
| <i>R. v. Nova Scotia Pharmaceutical Society</i> .....   | 11                |
| <i>R. v. Sparrow</i> .....  | 25                |
| <i>Reference re B.C. Motor Vehicle Act</i> .....  | 16                |
| <i>Reference re Firearms Act (Can.)</i> .....   | 24                |
| <i>Retail, Wholesale and Department Store Union, Local 558 v. Pepsi-Cola Canada<br/>Beverages (West) Ltd.</i> ..... | 7                 |
| <i>Ruby v. Canada (Solicitor General)</i> .....   | 7, 20             |
| <i>Sauvé</i> .....  | 5, 6, 7, 8, 9, 10 |
| <i>Suresh</i> .....   | 5, 7, 11, 12, 20  |
| <i>Thomson Newspapers</i> .....   | 9                 |
| <i>Thomson Newspapers Co. v. Canada (Attorney General)</i> .....  | 9                 |
| <i>Vriend</i> .....   | 10                |
| <i>Walsh</i> .....  | 5, 19             |
| <i>Ward v. Canada (Attorney General)</i> .....  | 23, 24            |
| <i>Winnipeg Child and Family Services v. K.L.W.</i> .....   | 16                |