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Constitutional Cases 2003: An Overview

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These volumes of the *Supreme Court Law Review*, which consist of papers presented at Osgoode Hall Law School's 7th Annual Constitutional Cases Conference held on April 2, 2004, examine the constitutional decisions of the Supreme Court of Canada released in the calendar year 2003.¹ The Court handed down a total of 81 judgments in 2003,² 24 (or 30 per cent) of which were constitutional cases.³ As in

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¹ A case is defined as 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 Supreme Court of Canada, *Statistics 1993 to 2003: Bulletin of Proceedings: Special Edition*, available online at <<http://www.scc-csc.gc.ca>>, at 4 (hereinafter "Statistics").

³ The 24 constitutional decisions handed down in calendar year 2003 were as follows: *Barrie Public Utilities v. Canadian Cable Television Assn.*, [2003] 1 S.C.R. 476, [2003] S.C.J. No. 27 [hereinafter "*Barrie Public Utilities*"]; *Beals v. Saldanha*, 2003 SCC 72, [2003] S.C.J. No. 77 [hereinafter "*Beals*"]; *Bell Canada v. Canadian Telephone Employees Assn.*, [2003] 1 S.C.R. 884, [2003] S.C.J. No. 36 [hereinafter "*Bell Canada*"]; *Desputeaux v. Éditions Chouette (1987) Inc.*, [2003] 1 S.C.R. 178, [2003] S.C.J. No. 15 [hereinafter "*Desputeaux*"]; *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, [2003] 3 S.C.R. 3, [2003] S.C.J. No. 63 [hereinafter "*Doucet-Boudreau*"]; *Ell v. Alberta*, [2003] 1 S.C.R. 857, [2003] S.C.J. No. 35 [hereinafter "*Ell*"]; *Figuroa v. Canada (Attorney General)*, [2003] 1 S.C.R. 912, [2003] S.C.J. No. 37 [hereinafter "*Figuroa*"]; *Nova Scotia (Workers' Compensation Board) v. Martin*; *Nova Scotia (Workers' Compensation Board) v. Laseur*, [2003] 2 S.C.R. 504, [2003] S.C.J. No. 54 [hereinafter "*Martin*"]; *Paul v. British Columbia (Forest Appeals Commission)*, [2003] 2 S.C.R. 585, [2003] S.C.J. No. 34 [hereinafter "*Paul*"]; *R. v. Blais*, [2003] 2 S.C.R. 236, [2003] S.C.J. No. 44 [hereinafter "*Blais*"]; *R. v. Buhay*, [2003] 1 S.C.R. 631, [2003] S.C.J. No. 30 [hereinafter "*Buhay*"]; *R. v. Clay*, [2003] 3 S.C.R. 735, [2003] S.C.J. No. 80 [hereinafter "*Clay*"]; *R. v. Johnson*, [2003] 2 S.C.R. 357, [2003] S.C.J. No. 45 [hereinafter "*Johnson*"]; *R. v. Edgar*, [2003] 2 S.C.R. 388, [2003] S.C.J. No. 46 [hereinafter "*Edgar*"]; *R. v. Kelly*, [2003] 2 S.C.R. 400, [2003] S.C.J. No. 49 [hereinafter "*Kelly*"]; *R. v. Mitchell*, [2003] 2 S.C.R. 396, [2003] S.C.J. No. 48 [hereinafter "*Mitchell*"]; *R.*

previous years, the majority (17 out of 24) of the constitutional decisions in 2003 were Charter cases. Two cases dealt with Aboriginal rights issues, two with *Bill of Rights* issues, and four with federalism issues.

I. CHARTER CASES

The McLachlin Court continues to be extremely receptive to Charter claims. In 2003, the increase in the success rate of Charter cases seen throughout the McLachlin Court continued, with 11 of 17 (or 65 per cent) of the Charter claims heard succeeding. Since McLachlin J. became Chief Justice on January 7, 2000, 33 out of a total 62 (52 per cent) Charter claims have succeeded. This represents a marked increase from the success rate of 34 per cent (31 out of 90 cases) seen between 1996 and 1999, and the 32 per cent success rate (86 out of 264 cases) seen in the 1991-1995 period.

1. Remedial Powers (Section 24(1))

Doucet-Boudreau, the case Osgoode Hall Law School's Constitutional Advisory Board⁴ identified as the most significant decision of 2003, affirmed the power of superior courts to supervise the implementation of judicial orders issued under section 24(1). There, after finding that Nova Scotia had violated minority language rights, the trial judge

v. *Smith*, [2003] 2 S.C.R. 392, [2003] S.C.J. No. 47 [hereinafter "*Smith*"]; *R. v. Malmo-Levine*; *R. v. Caine*, [2003] 3 S.C.R. 571, [2003] S.C.J. No. 79 [hereinafter "*Malmo-Levine*"]; *R. v. Powley*, [2003] 2 S.C.R. 207, [2003] S.C.J. No. 43 [hereinafter "*Powley*"]; *R. v. S.A.B.*, [2003] 2 S.C.R. 678, [2003] S.C.J. No. 61 [hereinafter "*S.A.B.*"]; *R. v. Taillefer*; *R. v. Duguay*, [2003] 3 S.C.R. 307, [2003] S.C.J. No. 75 [hereinafter "*Taillefer*"]; *Trociuk v. British Columbia (Attorney General)*, [2003] 1 S.C.R. 835, [2003] S.C.J. No. 32 [hereinafter "*Trociuk*"]; *Unifund Assurance Co. v. Insurance Corp. of British Columbia*, [2003] 2 S.C.R. 63, [2003] S.C.J. No. 39 [hereinafter "*Unifund Assurance*"]; *Vann Niagara Ltd. v. Oakville (Town)*, [2003] 3 S.C.R. 158, [2003] S.C.J. No. 71 [hereinafter "*Vann Niagara*"]. In addition to these cases, the Court also released its decision in *Authorson v. Canada (Attorney General)*, [2003] 2 S.C.R. 40, [2003] S.C.J. No. 40 [hereinafter "*Authorson*"]. Although this decision does not consider a constitutional provision, it is quasi-constitutional in nature because of its consideration of the *Canadian Bill of Rights* (R.S.C. 1985, Appendix III).

⁴ Osgoode Hall Law School's Constitutional Advisory Board (the Advisory Board) consists of 43 of the leading academics, practitioners and government lawyers from across Canada.

ordered the province to establish French-language programs in various school districts by specified dates, and to use its “best efforts” to meet a judicially imposed schedule. This part of the trial judge’s order was not appealed by the province. However, Nova Scotia did appeal the further order requiring the province to submit ongoing compliance reports, on grounds that this raised unprecedented questions about the separation of powers and the institutional authority of the courts to enforce their judgments against the other branches of government.

The Nova Scotia Court of Appeal allowed the province’s appeal and overturned the portion of the trial judge’s order requiring compliance reports. In his majority opinion, Flinn J.A. stated that the Charter does not give courts the authority to ensure that governments comply with their orders, and questioned the necessity of the trial judge’s reporting order, as there was no evidence that the government did not intend to comply with the order.

By a 5-4 margin the Supreme Court reversed the appellate court and reinstated the trial judge’s order in its entirety. Justices Iacobucci and Arbour wrote a joint opinion for the majority which concluded that the reporting requirement was within the court’s jurisdiction to order remedies that are flexible and responsive to the needs of the particular case. In finding that ongoing supervision was an appropriate remedy in *Doucet-Boudreau*, they proposed a four-part test to define the scope of section 24 remedies: the first step asks whether the remedy meaningfully vindicates the rights and freedoms of the claimants; the second considers whether legitimate means are employed within the framework of constitutional democracy; the third assesses whether the remedy vindicates the right while invoking the court’s function and powers; and the fourth determines whether the remedy is fair to the party against whom the order is made, once having ensured that the right of the claimant is fully vindicated.

Doucet-Boudreau’s test creates several problems. For instance, Iacobucci and Arbour JJ.’s application of its criteria appears to be result-oriented and is driven by their desire to force the government to comply with the trial judge’s order. As Flinn J.A. noted, there was no evidence that the government would not have complied without the reporting order. Further, the test fails to identify what limits, if any, exist in relation to judicial remedies under section 24(1). There were no special or exceptional circumstances that warranted ongoing judicial supervision in this case, other than the concern over whether the government would

in fact comply with the order in a timely way. Thus, in any future case in which a court is concerned as to whether the government will comply with an order, it will be open to the court to order ongoing compliance hearings such as were required in *Doucet-Boudreau*.

The dissenting opinion written by LeBel and Deschamps JJ. would have upheld the Court of Appeal's decision to overturn the reporting order. They concluded that the trial judge's failure to define the purpose of the compliance hearings violated the requirement of procedural fairness. In addition, the order violated the constitutional separation of powers by allowing the judiciary to supervise the executive. Further, by purporting to put pressure on the government to enhance minority language education, which is a political rather than a judicial function, the order violated the *functus officio* doctrine.

Several articles in the forthcoming volume 25 discuss the Court's decision in *Doucet-Boudreau*. Marilyn Pilkington,⁵ Debra McAllister⁶ and Kent Roach⁷ regard the decision to expand the judiciary's remedial powers under section 24(1) as a positive development. McAllister argues that the Canadian traditions of judicial restraint and mutual deference by courts and legislatures allow courts to issue structural injunctions without the political conflict that arose when the U.S. Supreme Court ordered similar remedies.

Marilyn Pilkington notes that the Court unanimously affirmed the availability of supervisory remedies, and that what separated the majority and minority opinions was a disagreement about whether supervisory remedies should be available as a matter of last resort or should constitute one of several options to remedy constitutional infringements. Pilkington and McAllister both express concerns about the restrictions *Doucet-Boudreau* places on statutory courts and administrative tribunals' authority to issue remedial orders. McAllister worries that despite substantial developments, a cohesive set of principles which would ensure a remedy for those whose rights have been infringed has not evolved. She points to gaps in the law, especially for the statutory courts

⁵ "Enforcing the Charter: The Supervisory Role of Superior Courts and the Responsibility of Legislatures for Remedial Systems" (2004), 25 Sup. Ct. L. Rev. (2d) (forthcoming).

⁶ "Charter Remedies and Jurisdiction to Grant Them: The Evolution of Section 24(1) and Section 52(1)" (2004) 25 Sup. Ct. L. Rev. (2d) (forthcoming).

⁷ "Principled Remedial Discretion under the Charter" (2004) 25 Sup. Ct. L. Rev. (2d) (forthcoming).

and administrative tribunals that lack the authority to grant a remedy. Her conclusion that the legislatures must take up the issue is supported by Pilkington, who argues that Parliament and the legislatures have a constitutional responsibility to review and amend statutory jurisdiction and procedure to give effect to section 24's broad remedial jurisdictions.

Kent Roach explores the requirements for a principled approach to remedial decision-making by analyzing the Court's split decisions in *Doucet-Boudreau* and *British Columbia (Minister of Forests) v. Okanagan Indian Band*.⁸ He suggests that principled remedial discretion requires a judge to apply general principles, including the need for effective remedies and respect for institutional role, to the context of a particular violation. To explain what he means, Roach compares that approach to two other forms of remedial decision-making which he describes as strong discretion and rule-based discretion. He concludes that *Doucet-Boudreau* marks a positive development, because members of the Court agreed on the relevant principles and provided a principled framework for the future, despite not agreeing how those principles should apply in that case. By contrast, he is more troubled by *Okanagan Indian Band*'s failure to agree on the principles that should inform the judge's discretion to award interim or advance costs.

Meanwhile, Allan Hutchinson declines to side with those who view the majority decision in *Doucet-Boudreau* as blatant and unwelcome judicial activism, or with others who applaud the Court for overcoming the pusillanimity of some of its members and providing meaningful protection for constitutional rights as a result.⁹ Instead he proposes an alternative viewpoint: that whether activist or restrained, the judges are involved in an inevitably and thoroughly political exercise. Hutchinson maintains that efforts to separate law from politics are doomed to failure.

⁸ 2003 SCC 71, [2003] S.C.J. No. 76 (December 12, 2003). This case deals with a court's power to make interim costs orders and was not a constitutional case.

⁹ "Judges and Politics: An Essay from Canada" (2004) 25 Sup. Ct. L. Rev. (2d) (forthcoming).

2. Legal Rights (Sections 7 and 8 of the Charter)

The trilogy of marijuana cases (*Malmo-Levine*, *Caine* and *Clay*), which upheld the *Narcotic Control Act's* prohibition on marijuana possession and use, was selected by the Advisory Board as the third most significant constitutional decision of 2003.¹⁰ Though the possession offence was also challenged under the division of powers and section 15(1) of the Charter, the Court's opinions in these cases focused on section 7.¹¹ Specifically, the question was whether fundamental justice includes a "harm principle" that limits the government's power to criminalize "unharmful behaviour".¹² By a vote of 6-3, the Court held that the Parliament is not constrained by a constitutional concept of harm in deciding what conduct should be criminalized. The majority opinion also concluded that the drug offences were not arbitrary or irrational, in the constitutional sense, and that the availability of a prison sentence did not render them grossly disproportionate under section 7 or section 12 of the Charter.

Three members of the Court dissented. Justice Arbour alone held that harm is a constitutionally required component of any offence punishable by imprisonment. In her view, the social harms of marijuana use are not sufficient to justify the potential punishment of imprisonment. Justices LeBel and Deschamps also concluded, in separate dissenting reasons, that the offence was unconstitutional because the penalty of imprisonment and the measures used to enforce the law on possession are "disproportionate" to the societal problem of marijuana use. Their position on this issue is somewhat surprising, given that their dissent in *Doucet-Boudreau* stressed that the judiciary should not intrude on the policy-making function of the legislature. A judgment as to whether the penalty for marijuana possession is disproportionate to the societal problem posed by marijuana possession seems a quintessentially legislative

¹⁰ The second most significant constitutional decision was *Powley*. It is discussed in the Aboriginal rights section below.

¹¹ The provisions challenged in *Malmo-Levine* were: *Narcotic Control Act*, R.S.C. 1985, c. N-1, ss. 3(1), 4(2) [Act repealed, S.C. 1996 c. 19, s. 94, effective May 14, 1997]. *Clay* was a challenge to s. 3(1) of the *Narcotic Control Act*.

¹² The harm principle, adapted from John Mill's *On Liberty*, would require that for an activity to be criminalized, it must cause harm to other individuals or present a serious risk of harm.

judgment that might have been thought to fall outside the bounds of the judicial role.

Early in 2004, the Court upheld section 43 of the *Criminal Code*, which allows parents and teachers to use physical force to discipline children.¹³ Chief Justice McLachlin wrote the majority opinion, which held under section 7 that the provision adversely affects children's security of the person, but does not offend a principle of fundamental justice. She concluded that, when properly construed, section 43 is not unduly vague or overbroad, because it sets real boundaries and delineates a risk zone for criminal sanction. She then proceeded to articulate the boundaries on its application that would prevent discretionary law enforcement from occurring under section 43. Justice Arbour dissented on the ground that the provision violates the rights of children and is unconstitutionally vague. Justice Binnie's partial dissent focused on the section 15 claim, which is discussed below, as did that of Deschamps J.

Roslyn Levine¹⁴ and Paul Burstein's¹⁵ articles consider the status of the harm principle as an aspect of fundamental justice under section 7 in light of these decisions. Levine endorses the Court's decision to reject the harm principle, because in her view it is necessary to balance individual liberty rights and state interests to determine what fundamental justice requires. The difficulty for her is that such a principle would permanently predispose the section 7 balance in favour of the individual's interest and in doing so significantly change the content of the guarantee. Even so, Levine warns that the principle influences the Court's perception of the types of arbitrariness, irrationality, and gross disproportionality that are inconsistent with section 7's principles of fundamental justice. Accordingly, she concludes that the marijuana cases are not conclusive, and that discussions about the harm principle will continue for a long time.

Despite participating as counsel in cases that challenged the marijuana laws, Paul Burstein admits that the absence of a harm principle in

¹³ *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)* 2004 SCC 4, [2004] S.C.J. No. 6 [hereinafter "*Canadian Foundation*"]. Although this case was not decided in 2003, it is discussed in several articles in this volume.

¹⁴ "In Harm's Way: The Limits to Legislating Criminal Law" (2004), of this volume, at 195.

¹⁵ "What's the Harm in Having a 'Harm Principle' Enshrined in Section 7 of the Charter?" (2004), of this volume, at 159.

the section 7 jurisprudence may not be such a bad idea after all. The source of this revelation, in Burstein's case, is the Court's subsequent decision in *Canadian Foundation*. That is when he saw that the concept can cut both ways: a constitutionally entrenched harm principle might invalidate the marijuana laws but could also compel the criminalization of conduct Parliament had otherwise decriminalized. Even so, Burstein is critical of the marijuana trilogy for narrowing the scope of judicial review of the criminal law. He argues that these cases, which allow Parliament to criminalize anything that may cause non-trivial harm to the actor or to society, will make it more difficult to challenge over-reaching and unnecessary criminal provisions in the future.

In commenting on the marijuana trilogy, Janine Benedet asks whether the gross disproportionality standard may still operate in a fashion akin to the principle of *de minimis non curat lex*, and states that *Malmo-Levine* may represent an implicit recognition that *de minimis* is a principle of fundamental justice and thus a valid common law defence. More generally, she notes that the real issue is one of institutional competence: a question of determining who, as between Parliament and the courts, is better placed to judge the question of harm. In her paper, she notes a contradiction between the majority decisions in the marijuana trilogy and *Canadian Foundation*: though the Court permitted Parliament to criminalize any conduct that poses a risk of harm that is more than trivial in the marijuana trilogy, it refused to review Parliament's decision to shield individuals from criminal liability for causing harm to children in *Canadian Foundation*.

The legal rights protected by sections 8 to 14 did not play as prominent a role in this year's constitutional cases, and were overshadowed by section 7's marijuana trilogy and the Court's section 43 decision in early 2004.¹⁶ In that regard, it should be noted that the Court has heard argument in an important case from Manitoba, and that its decision in *R. v. Mann* is under reserve.¹⁷ *Mann* raises the question whether the police have the power to detain and search a person, despite not having grounds for arrest. The further issue before the Court is whether this power must be authorized by statute, to comply with the Charter, or can

¹⁶ But see *Buhay*, *supra*, note 3.

¹⁷ (2002), 169 C.C.C. (3d) 272, [2002] M.J. No. 380 (C.A.).

be grounded in the common law and constrained on a case by case basis through the evolution of judicial doctrine.

In addition, anticipation swells around two other cases that have now been heard, which test the Court's willingness to review social and health care policies under sections 7 and 15 of the Charter. *Auton v. British Columbia* is mainly a section 15 case, and will be discussed briefly in the next section of the overview.¹⁸ In *Chaoulli v. Quebec*, the claimants rely on section 7 of the Charter in an effort to be free of the province's mandatory health care scheme, which prohibits individuals from seeking access to services on a private basis which are publicly funded.¹⁹ *Chaoulli* raises the question of whether such restrictions on the use of private resources to access needed health care services can be justified when such services are not available in a timely way through the public system.²⁰ Quebec strenuously defended the right of governments to structure the health care system as a matter of social policy, on the ground that *Chaoulli*'s claim did not implicate the "administration of justice" and could not give rise to a section 7 claim.²¹ Certainly this case will provide an important indication of the Court's willingness to deal with a contentious and highly charged matter of social policy.

3. Equality Rights (Section 15)

The Court heard three major cases under section 15 in 2003; the claim succeeded twice, in *Trociuk v. British Columbia* and *Martin v.*

¹⁸ *Auton (Guardian ad Litem of) v. British Columbia (Attorney General)* (2002), 220 D.L.R. (4th) 411, [2002] B.C.J. No. 2258 (C.A.).

¹⁹ The claimants argue that restrictions on access to private health care services can only be constitutionally justified if such services are available in a timely way through the public system. *Chaoulli c. Québec (Procureur general)*, [2002] R.J.Q. 1205 (Que. C.A.), leave to appeal to S.C.C. allowed (2003), 319 N.R. 198 (note), 2003 Carswell Que 850 (May 8, 2003). The claimants argue that restrictions on access to private health care services can only be constitutionally justified if such services are available in a timely way through the public system.

²⁰ We disclose that Patrick Monahan acted as counsel for intervenors in the case who sought a ruling that the legislation in question is invalid in the absence of some form of legal guarantee of timely access to health care services.

²¹ The Court left this issue open in *Gosselin v. Quebec (Attorney General)*, [2002] 4 S.C.R. 429, [2002] S.C.J. No. 85. For a discussion, see J. Cameron, "Positive Obligations under Sections 15 and 7 of the Charter: A Comment on *Gosselin v. Quebec*" (2003) 20 Sup. Ct. L. Rev. (2d) 65.

Nova Scotia, before failing in *Canadian Foundation*, which was decided in January of 2004. The complexity and unpredictability of the Court's section 15 test in *Law v. Canada* has been criticized in recent years.²² From that perspective, it is noteworthy that its decisions in *Trociuk* and *Martin* were unanimous. By contrast, the division of opinion that emerged in *Canadian Foundation* reveals that the section 15 analysis continues to generate disagreement among members of the Court.

In *Trociuk*, the Court invalidated provisions of British Columbia's *Vital Statistics Act*,²³ which allowed the permanent exclusion of a father's particulars from the birth registration record if a mother chose, for any reason, not to acknowledge his status as the child's father. The Court dismissed the argument that the claim was weak because fathers do not belong to an "historically disadvantaged group". In doing so, Deschamps J. emphasized that no single element in the *Law* test is determinative of the dignity issue. Though fathers could justifiably be excluded in certain circumstances, the birth registration scheme was flawed because it permitted them to be *arbitrarily* excluded. Not only did that subject all unacknowledged fathers to a negative attribution similar to a stereotype, it failed to impair their rights as little as reasonably possible.

Then the Court held in *Martin* that a scheme denying benefits to workers who suffered from chronic pain was unconstitutional.²⁴ Though all workers covered by the program suffer a disability, Gonthier J. concluded that treating workers with *chronic* pain differently from those without such pain is a disability-based distinction under section 15. It was unnecessary to determine whether chronic pain workers have suffered a history of disadvantage, because the program could not satisfy the *Law* test's requirement that the different treatment correspond to their needs and circumstances. Under section 1 the problem in *Martin* was the same as in *Trociuk*: the blanket exclusion of chronic pain from the compensation scheme did not minimally impair the rights of those workers. That conclusion also made it unnecessary for the Court to

²² *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497, [1999] S.C.J. No. 12.

²³ R.S.B.C. 1996, c. 479, ss. 3(1)(b), 3(6)(b) [am. S.B.C. 2002, c. 74, s. 3].

²⁴ The impugned statute and regulations are: *Workers' Compensation Act*, S.N.S. 1994-95, c. 10, s. 10B, *Functional Restoration (Multi-Faceted Pain Services) Program Regulations*, N.S. Reg. 57/96.

decide whether fiscal considerations, and the cost of providing benefits, could ever be considered a pressing and substantial objective.

As noted above, *Canadian Foundation* was also decided under section 15(1). On that part of the claim, the majority held that the provision did not violate equality because a reasonable person, acting on behalf of a child, would not conclude that the child's dignity would be offended by forcible correction. Justice Binnie disagreed with that analysis, on the grounds that denying them the Charter's protection turns children into second class citizens, and in methodological terms imports a section 1 analysis into the guarantee. While Binnie J. upheld section 43 under section 1, Deschamps J. found a breach of section 15 which was not justifiable.

This year's commentators have drawn a variety of observations and conclusions from these cases. Once again, the Court's overall approach to equality claims has come under criticism. Geoffrey Cowper explains that the Court is holding to the *Law* test, though the test does not provide a formulaic answer which will satisfy all concerned. He observes that the meaning and relative importance of the test's contextual elements remain open to interpretation as a result. For instance, while offending human dignity compendiously describes the conclusion without advancing the analysis, the concept of a reasonable claimant allows either a subjective or objective perspective to dominate. His view of *Trociuk* is that the application of section 15 to a relatively unnoticed indignity addresses an aspect of justice that is more symbolic than real.

Colleen Sheppard's comment on *Trociuk* makes a similar point a different way, by comparing the reasoning of the lower courts with that of the Supreme Court, to illustrate "the indeterminacy of the current test of constitutional discrimination". She points up the uncertainty of deciding how a reasonable claimant who has been subject to different treatment might be expected to respond. Her analysis of *Martin* leads her to add that "the very nebulous overarching criterion of human dignity, assessed from the perspective of the reasonable claimant, does not appear to provide significant certainty in predicting outcomes".

With particular reference to *Martin*, Robert Charney and Daniel Guttman focus attention on the place of financial considerations in the

justification analysis under section 1.²⁵ In doing so, they maintain that the courts cannot ignore the fiscal implications of their decisions and the limitations under which governments operate in administering social and health care programs. They raise the critical question whether there are institutional boundaries on the judiciary's authority to intervene in the policy domain.

Janine Benedet states that *Canadian Foundation* deals a blow to historically subordinated groups seeking to use the right to equality to expose their experiences of state-sanctioned and socially accepted violence. She argues that the first and most obvious problem with the *Law* test is its focus on dignity as a proxy for equality. Pointedly, she asks why the Court cannot address questions of discrimination and equality in direct terms. Benedet and Sheppard both argue that the human dignity focus and the four contextual factors used to assess whether this requirement is met do not provide an appropriate basis for evaluating equality rights claims. Benedet argues that the human dignity element penalizes claimants who are able to maintain their dignity in the face of oppression. Sheppard concludes that the Court should move from its present substantive equality approach to a new inclusive equality focus.

In addition to commenting on the 2003 cases, Bruce Ryder, Codalia Faria and Emily Lawrence have surveyed the section 15 cases decided since 1989,²⁶ when the Court adopted a substantive equality approach to section 15 in *Law Society of British Columbia v. Andrews*.²⁷ Contrary to the view, sometimes expressed, that the Court favours equality-seeking groups, they find that section 15's success rate of 27.9 per cent is lower than the average success rate of all Charter claims, which is about 35 per cent. They also indicate that the success rate is higher under the *Law* test than it was under *Andrews*, thus disproving the contention that *Law*'s criteria have disadvantaged claimants. Even so, the authors are critical of the Court's application of the correspondence test, which considers the relationship between the grounds of discrimination at issue and the actual needs, capacities and circumstances of the claimant. As they explain, the claimants succeeded in *Trociuk* and *Martin* because the

²⁵ "Is Money No Object: Can the Government Rely on Financial Considerations under Charter Section 1?" (2004), of this volume, at 137.

²⁶ "What's *Law* Good For? An Empirical Overview and Charter Equality Rights Decisions", (2004), of this volume, at 103.

²⁷ [1989] 1 S.C.R. 143, [1989] S.C.J. No. 6.

requisite correspondence was lacking, but not in *Canadian Foundation* because the Court concluded that age corresponds to the need for physical correction.²⁸ After discussing the status of formal and substantive understandings of equality under *Law*, the authors propose revisions to the test which would promote substantive equality.

In *Auton*, which was mentioned above, the Court will face a huge test in deciding whether it is discriminatory for the Province of B.C. not to fund the special care needs of autistic children. The Court cannot uphold the appellate court's decision that the claimants are entitled to treatment under section 15 without imposing an obligation on the province to meet their needs, and intruding on the government's prerogative to decide whether, when and for whose benefit scarce resources will be allocated. Although it appears that the section 1 analysis may be crucial, the Court's tendency to disagree in applying *Law* means that the section 15 discussion will also form an important part of the analysis in *Auton*.

4. Fundamental Freedoms and the Right to Vote (Sections 2(b) and 3 of the Charter)

The Supreme Court decided *Figueroa v. Canada (Attorney General)*, a key case under section 3 of the Charter, in 2003. Though there were no important decisions on freedom of expression last year,²⁹ *Harper v. Canada (Attorney General)* is the most important section 2(b) case to arise in years. The Court's decision was released in May of 2004, days before a federal election was called.³⁰ Though *Harper* will be featured in next year's publication, the point for now is that *Figueroa* and *Harper* both address rights of democratic participation, and should be read together for that reason.

In *Figueroa* the Court relied on the right to vote that is guaranteed by section 3 of the Charter to invalidate provisions of the *Canada Elec-*

²⁸ This understanding of *Canadian Foundation* is also presented in Janine Benedet's article, "Hierarchies of Harm in Canadian Criminal Law: The Marijauna Trilogy and the Forcible 'Correction' of Children" (2004), of this volume, at 217.

²⁹ See *Vann Niagara* (dismissing a challenge to a by-law limiting the size of billboards), *supra*, note 3.

³⁰ 2004 SCC 33, [2004] S.C.J. No. 28.

tions Act,³¹ which made certain benefits and entitlements available only to political parties that fielded 50 candidates in an election. Those that did not cross that threshold could not be registered and were not eligible to issue tax receipts, to transfer unused election funds to the party, or to have party affiliation listed beside the candidate's name on the ballot. Curiously, the Court's majority opinion did not find the candidate minimum unconstitutional because it violated the rights of political parties, but because provisions withholding benefits from certain parties undermined the right of each citizen to meaningful participation in the election process. Writing for a 6-3 majority, Iacobucci J. held that the 50 candidate rule disadvantaged small parties in ways that would deny citizens' access to their ideas, and thus infringed their right, as voters, to play a meaningful role in the electoral process.

Despite agreeing with the disposition of the case, LeBel J. wrote separately to express his reservations about the majority opinion's methodology. In particular, he rejected an individualistic approach to the guarantee and maintained that communitarian aspects should influence the definition of the right. Though he agreed in the result, LeBel J. only did so only after balancing competing values within section 3. His approach was narrower than that of Iacobucci J., who articulated a right of meaningful participation that could have far-reaching consequences.

To give one example, *Figueroa's* endorsement of a voter's right to a certain level of participation in the electoral process should mean that the first-past-the-post electoral system violates section 3.³² This system has an even greater impact on the ability of small parties to introduce ideas into political debate than the 50 candidate threshold struck down in *Figueroa*. The outcome of a constitutional challenge to the first-past-the-post system will turn on the Court's assessment of how the various interests at stake should be balanced.

Danielle Pinard's article questions the Court's reliance on the distinction between section 3's literal words, which guarantee the right to vote, and its non-literal content, which includes the right to effective

³¹ R.S.C. 1985, c. E-2, ss. 24(2), 24(3), 28(2) [Act repealed S.C. 1990, c. 9, s. 576, effective September 1, 2000].

³² The first-past-the-post system is presently being challenged in the Ontario Superior Court of Justice in *Russow v. Canada (Attorney General and Chief Electoral Officer)*. The applicants allege that the system violates ss. 3 and 15(1) of the Charter.

representation.³³ In her view, it is not useful to draw distinctions between the literal and non-literal infringement of rights. She describes *Figueroa* as an exercise in abstract reasoning, and notes that although one might have expected to find information about the kinds of parties or ideologies that were excluded by the statutory advantages, the Court was less interested in empirical realities than in providing a political philosophy discourse.

Harper v. Canada raised the question whether federal legislation that places a \$3,000 limit on third party spending during a federal election violates section 2(b) of the Charter.³⁴ In *Figueroa*, the Court stated that each citizen must have a genuine opportunity to take part in the governance of the country through the selection of elected representatives.³⁵ Strict spending limits have a far greater impact on meaningful participation than the 50 candidate rule: such restrictions grant the political parties a monopoly on debate during an election campaign and, in doing so, effectively silence the voices of citizens. Over a strong dissent by McLachlin C.J. and Major J., Bastarache J. upheld the *Canada Election Act*'s restrictions on third party advertising in *Harper v. Canada (Attorney General)*.³⁶

His majority opinion made three key points. First, he stated that the \$3,000 maximum promoted an electoral process that is egalitarian in nature. Second, and despite acknowledging that the election advertising of third parties lies at the core of section 2(b), he claimed that the Court should defer to the legislature on this issue. Deference led to the third feature of his analysis, which permitted Parliament to prohibit expressive activity that is not harmful.

Not surprisingly, the dissent relied heavily on *Figueroa* and the importance of guaranteeing an equal voice to each citizen. Chief Justice McLachlin and Major J. stressed that the legislation set the spending limits at such a low level that third parties cannot effectively communicate with fellow citizens during an election. The practical effect is that communication during an election is confined to registered political

³³ "Some Thoughts on How the Court is Going About its Business: Desperately Seeking Coherence" (2004) 25 Sup. Ct. L. Rev. (2d) (forthcoming).

³⁴ The *Canada Elections Act*, S.C. 2000, c. 9, imposes spending limits on third parties of \$3,000 *per* constituency and \$150,000 nationally,

³⁵ *Figueroa*, at 936.

³⁶ 2004 SCC 33, [2004] S.C.J. No. 28.

parties and their candidates. They found the limit unconstitutional because there is a serious disproportion between the gravity of the danger arising from campaign spending, which the dissenters described as unproven, speculative and wholly hypothetical, and the severity of the threat to expressive freedom, which they regarded as draconian in nature.

5. Tribunals' Jurisdiction to Apply the Charter

In *Martin*, the Court clarified and simplified the rules that are to be applied to determine whether an administrative tribunal has jurisdiction to apply the Charter. This approach overrules the test laid out in *Bell v. Canada (Canadian Human Rights Commission)*; *Cooper v. Canada (Human Rights Commission)*.³⁷ The central question posed under the *Martin* approach is whether the tribunal is explicitly or implicitly given jurisdiction to decide questions of law arising under the provision that is the subject of the Charter challenge. Explicit jurisdiction is found in the tribunal's statutory grant of authority, while implicit jurisdiction is discerned by looking at the authorizing statute as a whole. It is important to note that if the tribunal has jurisdiction to decide questions of law arising from the provision, it is presumed to have jurisdiction to apply the Charter. This presumption may be rebutted by the party alleging that the tribunal does not have jurisdiction by pointing to a statutory provision explicitly withdrawing the tribunal's authority to consider the Charter. The party may also convince the court that an examination of the statutory scheme leads to the conclusion that the drafters of the legislation intended to exclude the tribunal from considering the Charter. Charney and Guttman³⁸ argue that the decisions reached in *Martin* and *Paul* indicate that governments must explicitly exclude tribunals from considering the Charter if they do not want a wide range of government activity to be subject to review.

Peter Hogg argues that the decisions reached in *Martin* and *Paul*³⁹ do not represent new developments in jurisprudence on tribunals' jurisdiction to apply the Charter; rather, they restate the position reached by

³⁷ [1996] 3 S.C.R. 854, 140 D.L.R. (4th) 193, [1996] S.C.J. No. 115.

³⁸ *Supra*, note 25.

³⁹ *Paul* is discussed in greater detail below in the "Federalism" section.

the Court in earlier cases.⁴⁰ Hogg agrees that tribunals should have the jurisdiction to issue remedies and that individuals whose Charter rights have been infringed should be able to access remedies at the most convenient forum. However, Hogg cautions that some tribunals are not well-suited to issuing remedies due to the nature of their expertise or caseload. He argues that amendments to these tribunals' authorizing statutes should be passed to explicitly exclude them from considering the Charter.

6. Bill of Rights

The Court issued decisions in two cases, *Authorson* and *Bell Canada*, that raised issues related to the *Canadian Bill of Rights*.⁴¹ Although both claims failed, they confirm the continuing relevance of section 2(e) of the *Bill of Rights*, the provision that establishes the right to a fair hearing in accordance with the principles of fundamental justice.

In *Authorson*, the Court held that section 2(e) was not violated by the federal government's failure to pay interest on the pensions it administered for disabled veterans, since section 2(e) is limited to procedural rights, and there are no special procedural rights that apply to the enactment of legislation. In addition, the Court held that the due process protection afforded by section 1(a) of the *Bill of Rights* does not include a substantive procedural guarantee in respect of the expropriation of property. However, Major J. for the Court did leave open the possibility that in appropriate circumstances (other than in respect of a property-based claim), the guarantee of due process in section 1(a) can include a substantive component. On the other hand, given that the Court has already determined that the "principles of fundamental justice" in section 7 of the Charter include a substantive component, it remains unclear whether section 1(a) of the *Bill of Rights* will add anything beyond the substantive protections already included in section 7.

⁴⁰ See *Douglas/Kwantlen Faculty Assn. v. Douglas College*, [1990] 3 S.C.R. 570, [1990] S.C.J. No. 124; *Cuddy Chicks Ltd. v. Ontario (Labour Relations Board)*, [1991] 2 S.C.R. 5, [1991] S.C.J. No. 42.

⁴¹ R.S.C. 1985, Appendix III.

The Court held unanimously in *Bell Canada* that provisions in the *Canadian Human Rights Act*⁴² allowing the Human Rights Commission to issue guidelines binding on the Human Rights Tribunal and to extend judges' terms to allow them to finish hearing a claim do not violate section 2(e). Chief Justice McLachlin and Bastarache J. held that guidelines issued by the Human Rights Commission are a form of law. As such, the tribunal's independence is not unduly restricted by being forced to apply the guidelines. Further, the power to extend members' appointments does not undermine the independence or impartiality of the tribunal.

The 2003 *Bill of Rights* decisions are explored by Lorne Sossin in his article, "The Quasi-Revival of the Canadian *Bill of Rights* and its Implications for Administrative Law".⁴³ Sossin is critical of the Court's rulings in *Authorson* and *Bell Canada* for treating the *Bill of Rights* as merely entrenching existing common law standards. In *Authorson*, Major J. stated that the *Bill of Rights* guarantees only those rights that were in existence at the time the *Bill of Rights* was enacted. Sossin argues that it is incorrect to interpret the *Bill of Rights*, a quasi-constitutional document, as protecting only the "embryonic" fair hearing and due process protections that existed at the time of its enactment. Further, he criticizes the Court for finding it unnecessary to consider section 2(e) of the *Bill of Rights* in *Bell Canada* because the common law standards of independence and impartiality had been satisfied. Sossin concludes that the *Bill of Rights* is likely to play an increasing scope in Canadian jurisprudence, a development that he regards as positive. However, he argues that for the *Bill of Rights* to be interpreted appropriately, the courts must develop a more sophisticated understanding of its relationship to the common law.

7. Administrative Law and the Reasonable Apprehension of Bias

Wewaykum Indian Band v. Canada did not arise under the division of powers or the *Charter of Rights*. *Wewaykum No. 1* concerned two Indian Bands in British Columbia, each of which claimed the other's

⁴² R.S.C. 1985, c. H-6, ss. 27(2), 27(3) [am. S.C. 1998, c. 9, s. 20], 48.1 [am. S.C. 1998, c. 9, s. 27].

⁴³ (2004) 25 Sup. Ct. L. Rev. (2d) (forthcoming).

reserve land, and each of which alleged a breach of fiduciary duty against the federal Crown.⁴⁴ *Wewaykum No. 2* was an attempt to vacate the Supreme Court of Canada's decision in *No. 1*, on the ground that there was a reasonable apprehension of bias that the participation of Binnie J., who wrote the majority opinion, was compromised.⁴⁵ The suggestion of bias was based on information, which emerged after the Court rendered its decision, that Mr. Justice Binnie had contact with the issues at stake in the litigation when he served as Associate Deputy Minister of Justice, in 1985 and 1986. In concluding that there was no reasonable apprehension of bias, the Court emphasized that Binnie J. had not been counsel in the case, that the passage of time between his contact with the file as a government lawyer and his contact as a judge had been at least 15 years, that he did not recall the particulars after that lapse of time, and that the Supreme Court's decision making process comprised nine judges and not a single decision maker.

Adam Dodek's paper contends that *Wewaykum No. 2* is not only an administrative law decision, but one which implicates constitutional principles as well.⁴⁶ He maintains that judicial impartiality is an important core value in our constitutional system and suggests that Parliament, the bar, and the Court itself have duties to protect the integrity of the Supreme Court of Canada. While Parliament should codify the circumstances and procedures for disqualification, the Court should direct counsel to deal with recusal issues at the time of the hearing, rather than after the fact, and members of the bar should be required to act with due diligence on questions of disqualification.

II. ABORIGINAL RIGHTS

Two Aboriginal rights claims, *Blais* and *Powley* were heard by the Court in 2003, with the claim in *Powley* succeeding. *Powley*, which sets out the framework for identifying Métis rights under section 35 of the *Constitution Act, 1982*, was selected by the Advisory Board as the second most significant constitutional decision of 2003. There are two

⁴⁴ [2002] 4 S.C.R. 245, [2002] S.C.J. No. 79.

⁴⁵ [2003] 2 S.C.R. 259, [2003] S.C.J. No. 50.

⁴⁶ "Constitutional Legitimacy and Responsibility: Confronting Allegations of Bias After *Wewaykum Indian Band v. Canada*" (2004) 25 Sup. Ct. L. Rev. (2d) (forthcoming).

important elements to this decision. The first is the definition of “Métis” identified by the Court. Because section 35 does not define the term “Métis”, the Court was required to determine who may qualify as a potential claimant under section 35. The Court concluded that not all persons of mixed European and Aboriginal heritage qualify as Métis. Rather, the Métis must be a distinctive people or community living together in the same geographic area and sharing a common way of life. There must also be continuity and stability over time in the community. Verification of a claimant’s membership in the Métis community is to be based on the individual’s self-identification, ancestral connection and acceptance in the community. This test is vague and will certainly require refinement through future litigation. However, it is important to note that by failing to include any definition of “Métis” in section 35, the drafters of the *Constitution Act, 1982* assigned the courts a daunting, quasi-legislative task. In our view *Powley* represents an important first step in fashioning a meaningful yet flexible definition to the term Métis.

The second important element of *Powley* is that it modifies the pre-contact test for Aboriginal rights established in *R. v. Van der Peet*⁴⁷ to accommodate Métis claims. The Court held that Métis rights protected by section 35 of the *Constitution Act, 1982* must be established with reference to the date of “effective control” by Europeans, rather than that of first European contact. Section 35 is held to protect those practices, customs and traditions that existed when Europeans effectively established political and legal control in the particular area. It is not clear whether “effective control” differs from the date of assertion of sovereignty, the latter being the date relied on in *Delgamuukw* for determining claims of Aboriginal title. In short, there now appear to be three distinct points in time that may be relevant for assessing Aboriginal claims under section 35: the date of contact for Aboriginal rights generally (*Van der Peet*); the date of “effective control” for claims of Métis rights (*Powley*); and the date of assertion of European sovereignty for claims of Aboriginal title (*Delgamuukw*). Applying these distinctions in future cases will raise difficult historical questions, and may

⁴⁷ [1996] 2 S.C.R. 507, [1996] S.C.J. No. 77. *Van der Peet* had held that Aboriginal rights were based on practices, customs and traditions of an Aboriginal community existing at the date of contact with Europeans. Such a test obviously would be inappropriate with respect to Métis claims, since the Métis people were the product of contact between European and Aboriginal societies.

lead to inconsistent or arbitrary results, which may well cause the Court to attempt to consolidate or simplify these rules.

There are three articles in this volume examining the implications of the *Powley* decision. All agree that *Powley* is the first step in a long road toward developing a comprehensive framework for Métis rights. Lori Sterling and Peter Lemmond's paper, "*R. v. Powley: Building a Foundation for the Constitutional Recognition of Métis Aboriginal Rights*", identifies several issues that the case failed to resolve.⁴⁸ In particular, they observe that some Aboriginal groups will be able to rely alternatively on the *Van der Peet* and *Powley* tests, thus leaving open the possibility that the "point of contact" test in *Van der Peet* may not survive. Because the benchmark date chosen in *Powley* will allow greater assertion of commercial rights, Aboriginal groups are likely to seek the application of the *Powley* test to their community. Sterling and Lemmond also contend that the Court provided too little reasoning on why the date of effective European control was chosen as the benchmark date in *Powley*, thus leaving the possibility of inconsistent decisions in the future. They conclude that there is much work to be done in recognizing and developing Métis rights.

Jean Teillet's paper, "Old and Difficult Grievances: Examining the Relationship Between the Métis and the Crown", reviews the decision in light of the historical relationship between the Crown and the Métis.⁴⁹ She finds that section 35 of the *Constitution Act, 1982* has so far failed in its purpose of resolving "old and difficult grievances" between the Métis and the Crown arising from the Crown's historical refusal to deal with the Métis as a people. In Teillet's estimation, *Powley* confirms that the Crown owes the Métis a duty of consultation and accommodation. In her view, this duty is still not being met.

In his paper "Negotiations With Métis: What Courts Can Do to Help," Shin Imai argues that negotiation and litigation must play complementary roles in determining the framework of Métis rights.⁵⁰ He suggests that the principle established in *Doucet-Boudreau* to the effect that superior courts may retain jurisdiction to supervise the ongoing implementation of a judicial order should be expanded to allow

⁴⁸ (2004), of this volume, at 243.

⁴⁹ (2004), of this volume, at 291.

⁵⁰ (2004), of this volume, at 269.

courts to supervise ongoing negotiations between the Crown and the Métis. Under this model, the role of the courts would be to assign rights to the Crown and to the Métis in its decisions, and then to remain in a supervisory position to establish a negotiation process and ensure the integrity of negotiations. This context would allow greater success in the negotiations.

Teillet, Imai and Sterling and Lemmond all emphasize the difficulty and necessity of identifying Métis communities and defining what constitutes individual membership in those communities. They report that at present, individuals seeking to exercise Métis rights are required to prove their family's genealogy for several generations. This clearly imposes a difficult burden on claimants. All these writers suggest that extensive political negotiations will be required to develop a framework that allows individuals to exercise their Métis Aboriginal rights without having to meet an unduly onerous burden of proof.

III. FEDERALISM

Although there were no major developments in the area of federalism in 2003, several federalism decisions were released, the most noteworthy being *Unifund Assurance* and *Paul*.

Unifund Assurance arose from a motor vehicle accident in British Columbia that involved Ontario residents who were vacationing there. The Ontario residents successfully sued in B.C. for damages, and also received statutory accident benefits from their Ontario insurance company. The amount of the accident benefits received from the Ontario insurer was deducted from the damages payable by the B.C. insurer. The Ontario insurer brought an action in Ontario against the B.C. insurer, seeking to be reimbursed for the amount it had paid the Ontario residents, on grounds that the B.C. insurer had received a 'windfall' by being allowed to set off the money paid in Ontario from the B.C. award.⁵¹ The Supreme Court of Canada, by a narrow 4-3 margin, held that the accident in question did not have a "real and substantial connection" with Ontario and, accordingly, Ontario legislation could not be

⁵¹ The action was brought under Ontario's *Insurance Act*, R.S.O. 1990, c. I-8, s. 275, which provides a statutory mechanism for transferring losses between Ontario insurance companies arising out of the payment of accident benefits.

applied so as to permit the Ontario insurer to claim reimbursement from the B.C. insurer.⁵² While the facts of the case are complicated, and thus potentially of limited application in future litigation, the case is nevertheless noteworthy in the sense that it represents one of the few recent cases in which the territorial jurisdiction of a province has been held to limit the reach of provincial legislation and the jurisdiction of provincial superior courts.⁵³

Finally, the Court also released its decision in *Paul* giving the B.C. Forest Appeals Commission the authority to decide questions of Aboriginal rights that arise incidentally to forestry matters. In this case Thomas Paul, who was a registered Indian, had been charged under B.C.'s Forest Practices Code with cutting Crown timber illegally. Paul asserted that he had a constitutionally protected Aboriginal right to cut timber for house modification. At issue was whether the Forest Appeals Commission, a provincial statutory body, had jurisdiction to hear and decide, at first instance, whether this defence applied. In holding that the Commission did have the necessary jurisdiction, the Supreme Court reinforced its recent decision in *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)*,⁵⁴ which recognized provincial authority to apply laws to Aboriginal peoples, provided that these laws do not infringe section 35 of the *Constitution Act, 1982* and do not touch on the "core of Indianness".

IV. UNANIMITY AND DISSENT IN 2003 CONSTITUTIONAL CASES

This year, the Court was unanimous in 17 out of the 24 (or 71 per cent) of the constitutional cases it decided. The percentage of unanimous decisions was considerably higher than that in 2002, when the Court was unanimous in only 14 out of 23 (or 61 per cent) of the cases it

⁵² The "real and substantial connection" test as a basis for determining the territorial jurisdiction of provincial courts was established by the Court in *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077, [1990] S.C.J. No. 135.

⁵³ Compare with *Global Securities Corp. v. British Columbia (Securities Commission)*, [2000] 1 S.C.R. 494, [2002] S.C.J. No. 5 (upholding application of provincial law providing for assistance in the investigation of possible violation of U.S. securities law).

⁵⁴ [2002] 2 S.C.R. 146, [2002] S.C.J. No. 33.

decided.⁵⁵ Although these figures seem to indicate that the Court is reaching agreement in a greater number of cases, a review of unanimity rates since 1995 indicates that the Court released split decisions in a disproportionately high number of cases in 2002 (see Table 1 below). 2003 represented a return to more typical rates of unanimity. Overall, since Justice Beverley McLachlin became Chief Justice in 2000, the Court has been unanimous in about two-thirds of its constitutional decisions (53/78 or 68 per cent unanimous).

Table 1: Unanimous versus Split Decisions in all Constitutional Cases 1995-2003 (includes Federalism, Aboriginal and Charter decisions)

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 %
2003	17	7	71 %

While recognizing that the significant majority of cases are unanimous, it nevertheless is of interest to track the degree to which individual members of the Court dissent in constitutional cases. In fact, the most frequent dissenters in constitutional cases during the “McLachlin Court” have been Arbour and LeBel JJ., each having dissented 10 times during this period, while the least frequent dissenters were Gonthier and Iacobucci JJ.⁵⁶ Also of interest is the fact that dissents in constitutional

⁵⁵ Patrick Monahan and Nadine Blum, “Constitutional Cases 2002: An Overview” (2003) 20 Sup. Ct. L. Rev. (2d) 3, at 27.

⁵⁶ See Table 2. Although Gonthier J. had fewer dissents, he retired from the Court in 2003, whereas Iacobucci J. has been (until his retirement in June 2004) a member of the Court for the entire 4 years of Justice McLachlin’s tenure as Chief Justice.

cases are much more likely to favour claimants as opposed to governments, with about two-thirds of the dissents over the last four years (41/59) favouring claimants. Indeed, over the past four years only Gonthier J. dissented more often in favour of governments rather than claimants. This voting pattern is subject to a variety of interpretations. However, it would seem that in cases where the Court is divided, the dissent is likely to take a more expansive or favourable view of the claimant's position than is the Court's majority. Overall, however, the most striking aspect of these figures is the relatively low level of dissent and the continuing high degree of consensus in constitutional decisions of the Supreme Court of Canada.

Table 2: Dissents in Constitutional Cases on the McLachlin Court – January 1, 2000 to December 31, 2003

Justice	Dissents	Direction of Dissent (Favoured Claim/Challenge)	Direction of Dissent (Opposed Claim/Challenge)
McLachlin C.J.	6	5	1
Gonthier J.	3	0	3
Iacobucci J.	5	5	0
Major J.	8	4	4
Bastarache J.	6	3	3
Binnie J.	7	5	2
Arbour J.	10	10	0
LeBel J.	10	7	3
Deschamps J.	4	2	2

V. CONCLUSION

Several articles in the next volume analyze and critique the overall approach taken by the Court to Charter claims in 2003. In commenting generally on the jurisprudence, Danielle Pinard addresses the role facts and evidence play in determining where decisions should be placed on the spectrum from activism to restraint.⁵⁷ Her focus is on methodology

⁵⁷ "Some Thoughts on How the Court is Going About its Business: Desperately Seeking Coherence" (2004) 25 Sup. Ct. L. Rev. (2d) (forthcoming).

and, from that perspective, she contends that activism is strongest when it flows from unpredictability. In her view, the Court's power to decide and modify methodological requirements as cases arise and unfold is the power to pave the way to the desired result. It is a power that Pinard regards as dangerous. After illustrating the point by reviewing the Court's methodology in some of the 2003 cases, she suggests that the need for flexibility should not be an excuse for arbitrariness, and adds that to stay within its institutional boundaries, the Court must make use of intelligible principles in its decision making.

Looking ahead, Grant Huscroft uses the upcoming Same Sex Reference to explore and reflect on the debilitating effect judicial exclusivity in Charter interpretation can have on the political process.⁵⁸ He is critical of the Ontario Court of Appeal's remedial order in *Halpern v. Canada*, which struck down the common law definition of marriage without providing an opportunity for Parliament to consider whether to enact legislation in light of the invalidity of the common law definition, a result he considers contemptuous of the democratic processes that were underway.⁵⁹ He is equally critical of the federal government for postponing a legislative response to the Court of Appeal and asking the Supreme Court questions to which Huscroft believes it knows the answers. Not only does he regard the strategy as disingenuous politically, he concludes that it undermines Parliament's status as a constitutional actor. He notes that political inertia on rights-based issues is a problem, but demonstrates that the Court is as much a part of the problem as the solution. Democracy is not for the faint-hearted and, in his view, the challenge for the Supreme Court is to ensure there is more to democratic constitutionalism than simply judicial review.

Allan Hutchinson writes that to accept the political nature of adjudication does not strike the death-knell for democracy.⁶⁰ He suggests that

⁵⁸ "Thank God We're Here: Judicial Exclusivity in Charter Interpretation and its Consequences" (2004) 25 Sup. Ct. L. Rev. (2d) (forthcoming).

⁵⁹ On July 16, 2003, the government of Canada directed the Supreme Court of Canada to answer three questions relating to the constitutionality of same sex marriage. A fourth has now been added and the Reference will be heard in the fall of 2004. The Ontario Court of Appeal decision in *Halpern v. Canada (Attorney General)* can be found at (2002), 60 O.R. (3d) 321, [2002] O.J. No. 2714.

⁶⁰ "Judges and Politics: An Essay from Canada" (2004) 25 Sup. Ct. L. Rev. (2d) forthcoming).

the appropriate inquiry in a constitutional democracy is not whether the courts have acted politically, but whether the political choices they make will serve democracy. The real issue is not the politicization of the judiciary, but the democratic failure of the executive and legislative branches to fulfill their constitutional responsibilities and mandate.

By far the biggest development at the Supreme Court of Canada in recent months is the retirements of Arbour and Iacobucci JJ., both of whom retired in June 2004. At the commencement of the Court's fall 2004 term, four out of the nine justices will have been members for less than two years.⁶¹ This is the largest proportion of relatively inexperienced justices on the Court since 1990, when five judges had less than two years of experience.⁶² Also of significance is the fact that the two new appointments are to be selected on the basis of a more transparent selection process.

In a speech delivered at Osgoode Hall Law School in October 2002, Paul Martin proposed that Parliament have an advisory role in reviewing appointments to the Supreme Court, but he did not specify what such a role might entail. Following his appointment as Prime Minister in December 2003, Prime Minister Martin asked the Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness to review and report on how best to implement a system of prior review of Supreme Court of Canada appointments. The Committee held hearings in early 2004 and reported in May 2004.⁶³ The focus of the debate before the Committee was whether to recommend a public hearing in which a prospective candidate for appointment to the Supreme Court would be interviewed. The Justice Committee recommended against such a public hearing, proposing, instead, that as an interim measure the

⁶¹ The four justices with less than two years of experience will be Deschamps and Fish JJ. as well as the two individuals appointed to replace Iacobucci and Arbour JJ. Justice Deschamps was appointed to the Court on August 7, 2002; Justice Fish was appointed on August 5, 2003. Supreme Court of Canada, "Judges of the Court," see online <<http://www.scc-csc.gc.ca>>.

⁶² In 1990, the five judges with less than two years of experience were: Sopinka J. (appointed May 24, 1988), Gonthier J. (appointed February 1, 1989), Cory J. (appointed February 1, 1989), McLachlin J. (appointed March 30, 1989) and Stevenson J. (appointed September 17, 1990). Supreme Court of Canada, "Judges of the Court", see online, <<http://www.scc-csc.gc.ca>>.

⁶³ See "Improving the Supreme Court of Canada Appointments Process" (May 2004), available online at <<http://www.parl.gc.ca>>.

Minister of Justice appear before the Justice Committee to discuss the process by which the current vacancies on the Court were filled and the qualifications of the two appointees. On a longer-term basis, the Justice Committee proposed creating an Advisory Committee, composed of representatives of the parties with official standing in the House of Commons, representatives of the provinces, members of the judiciary and lay members. The Advisory Committee would deliberate in private and would compile a short list of names of appointees which would be provided to the Minister of Justice and from which the selection would be made.

The Justice Committee's recommendations are consistent with the proposals put forward by Ontario Attorney General Michael Bryant in his contribution to this volume.⁶⁴ He explains that what is at stake is the relationship between the branches of government that form the basic structure of our society, and states that in considering changes to the appointment process, we should proceed with caution. The Attorney General is concerned by the prospect of replacing Canada's process with the American approach. In his view this would be a mistake because it might create expectations and a mandate for the nominee: a future in which Canada's judges are forced to be politicians with robes on. He urges us not to confuse transparency which focuses on the judge and strikes at the impartiality of the judiciary, with transparency of the process, which makes sense.

As of this writing (July 2004), the Prime Minister has yet to indicate the manner in which greater transparency in the appointment process will be achieved. It will be interesting to observe whether the fact that a minority government was returned in the June 2004 federal election will influence the degree to which a Parliamentary committee is provided with the opportunity to review potential Supreme Court appointees, since the government will no longer control a majority on House committees. What is clear is that any change in the process of appointment could have significant implications for the long-term composition and performance of the Court and, thus, must be approached with great care and caution.

⁶⁴ See the Honourable Michael J. Bryant, "Judging the Judges: Judicial Independence and Reforms to the Supreme Court of Canada Appointment Process" (2004), of this volume, at 29.