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Patrick J. Monahan

Osgoode Hall Law School of York University

Christian Kurtz

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Constitutional Cases 2005: An Overview

Patrick J. Monahan* and Christian Kurtz**

These volumes of the *Supreme Court Law Review*, which consist of papers presented at Osgoode Hall Law School's Ninth Annual Constitutional Cases Conference held on April 28, 2006, examine the constitutional decisions of the Supreme Court of Canada released in the calendar year 2005.¹ The court handed down a total of 89 judgments in 2005,² 29 (or 33 per cent) of which were constitutional cases. In a departure from previous years, only one-half of the constitutional decisions this year were Charter challenges,³ the other half being divided

* Professor and Dean, Osgoode Hall Law School.

** Member of the LL.B. class of 2009, Osgoode Hall Law School, and the J.D. class of 2009, New York University School of Law.

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, *Bulletin of Proceedings: Special Edition, Statistics 1995-2005*, available online at <http://www.scc.csc.gc.ca/information/statistics/HTML/cat4_e.asp>.

³ *Montreal (City) v. 2952-1366 Québec Inc.*, [2005] S.C.J. No. 63, [2005] 3 S.C.R. 141 [hereinafter "*Montreal*"]; *Chaoulli v. Québec (Attorney General)*, [2005] S.C.J. No. 33, [2005] 1 S.C.R. 791 [hereinafter "*Chaoulli*"]; *Okwuobi v. Lester B. Pearson School Board; Casimir v. Québec (Attorney General); Zorrilla v. Québec (Attorney General)*, [2005] S.C.J. No. 16, [2005] 1 S.C.R. 257 [hereinafter "*Okwuobi*"]; *Gosselin (Tutor of) v. Québec (Attorney General)*, [2005] S.C.J. No. 15, [2005] 1 S.C.R. 238 [hereinafter "*Gosselin*"]; *Solski (Tutor of) v. Québec (Attorney General)*, [2005] S.C.J. No. 14, [2005] 1 S.C.R. 201 [hereinafter "*Solski*"]; *UL Canada Inc. v. Québec (Attorney General)*, [2005] S.C.J. No. 11, [2005] 1 S.C.R. 143 [hereinafter "*UL Canada*"]; *Toronto Star Newspapers Ltd. v. Ontario*, [2005] S.C.J. No. 41, [2005] 2 S.C.R. 188 [hereinafter "*Toronto Star*"]; *R. v. Pires; R. v. Lising*, [2005] S.C.J. No. 67, [2005] 3 S.C.R. 343 [hereinafter "*Pires*"]; *R. v. Spence*, [2005] S.C.J. No. 74, [2005] 3 S.C.R. 458 [hereinafter "*Spence*"]; *R. v. Henry*, [2005] S.C.J. No. 76, [2005] 3 S.C.R. 609 [hereinafter "*Henry*"]; *Medovarski v. Canada (Minister of Citizenship and Immigration)*, [2005] S.C.J. No. 31, [2005] 2 S.C.R. 539 [hereinafter "*Medovarski*"]; *R. v. Orbanski; R. v. Elias*, [2005] S.C.J. No. 37, [2005] 2 S.C.R. 3 [hereinafter "*Orbanski*"]; *R. v. Chow*, [2005] S.C.J. No. 22, [2005] 1 S.C.R. 384 [hereinafter "*Chow*"]; *R. v. Wiles*, [2005] S.C.J. No. 53, [2005] 3 S.C.R. 895 [hereinafter "*Wiles*"]; *R. v. C. (D.)*, [2004] S.C.J. No. 77, [2005] 1 S.C.R. 133 [hereinafter "*C. (D.)*"].

between federalism issues (eight cases),⁴ Aboriginal issues (two cases),⁵ and five other constitutional cases.⁶

I. CHARTER CASES

In purely statistical terms, the Court did not appear to be particularly receptive to Charter claims in 2005, with only three out of 15 (or 20 per cent) of Charter claims succeeding. This is somewhat of a departure from recent experience under the McLachlin Court; in each of the three previous years, more than one-half of the Charter claims considered by the Court were successful.⁷ Nevertheless, while in percentage terms the Court may have appeared unreceptive to Charter claims in 2005, by far the most significant decision of the year was *Chaoulli*, where the Court boldly and unexpectedly struck down provisions in Quebec law prohibiting the sale of private health insurance. What was particularly remarkable about *Chaoulli* was the willingness of the Court to overturn a key provision of an important statute dealing with social policy, an area where the Court has traditionally been extremely deferential to the executive and legislative branches. Without a doubt, *Chaoulli* was the most significant constitutional case of the year, and potentially of the entire decade.

⁴ *British Columbia v. Imperial Tobacco Canada Ltd.*, [2005] S.C.J. No. 50, [2005] 2 S.C.R. 473 [hereinafter "*Imperial Tobacco*"]; *Reference re Employment Insurance Act (Can.)*, ss. 22 and 23, [2005] S.C.J. No. 57, [2005] 2 S.C.R. 669 [hereinafter "*Reference re EIA*"]; *Chaoulli v. Quebec (Attorney General)*, [2005] S.C.J. No. 33, [2005] 1 S.C.R. 791 [hereinafter "*Chaoulli*"]; *Castillo v. Castillo*, [2005] S.C.J. No. 68, [2005] 3 S.C.R. 870 [hereinafter "*Castillo*"]; *Kirkbi AG v. Rivik Holdings Inc.*, [2005] S.C.J. No. 66, [2005] 3 S.C.R. 302 [hereinafter "*Kirkbi*"]; *Fédération des producteurs de volailles du Québec v. Pelland*, [2005] S.C.J. No. 19, [2005] 1 S.C.R. 292 [hereinafter "*Pelland*"]; *Rothmans, Benson & Hedges Inc. v. Saskatchewan*, [2005] S.C.J. No. 1, [2005] 1 S.C.R. 188 [hereinafter "*Rothmans*"]; *UL Canada Inc. v. Quebec (Attorney General)*, [2005] S.C.J. No. 11, [2005] 1 S.C.R. 143 [hereinafter "*UL Canada*"].

⁵ *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] S.C.J. No. 71, [2005] 3 S.C.R. 388 [hereinafter "*Mikisew*"]; *R. v. Marshall*; *R. v. Bernard*, [2005] S.C.J. No. 44, [2005] 2 S.C.R. 220 [hereinafter "*Marshall*"].

⁶ *Canada (House of Commons) v. Vaid*, [2005] S.C.J. No. 28, [2005] 1 S.C.R. 667 [hereinafter "*Vaid*"]; *Provincial Judges' Assn. of New Brunswick v. New Brunswick (Minister of Justice)*; *Ontario Judges' Assn. v. Ontario (Management Board)*; *Bodner v. Alberta*; *Conférence des juges du Québec v. Quebec (Attorney General)*; *Minc v. Quebec (Attorney General)*, [2005] S.C.J. No. 47, [2005] 2 S.C.R. 286 [hereinafter "*Provincial Judges*"].

⁷ See Patrick J. Monahan & Nadine Blum, "Constitutional Cases 2002: An Overview" (2003) 20 S.C.L.R. (2d) 1; Jamie Cameron & Patrick J. Monahan, "Constitutional Cases 2003: An Overview" (2004) 24 S.C.L.R. (2d) 1; Patrick J. Monahan & Evan Van Dyk, "Constitutional Cases 2004: An Overview" (2005) 29 S.C.L.R. (2d) 1.

1. *Chaoulli* and the Future of Health Care

The *Chaoulli* decision has proven tremendously controversial among commentators, with the Court being criticized for having entrenched a “two-tier” system of health care in Canada.⁸ In fact, however, I believe that much of this criticism has resulted from a misreading of the Court’s judgment and is misplaced.⁹ In my view, the Court does not mandate a particular organization of the health care system but, instead, merely indicates that there are legal limits to the length of time that patients can be expected to wait for care in the context of a universal health care system. All the Court has required, in other words, is that if the government wishes to maintain a universal public health care system and continue to preclude a parallel private system it can do so, provided that it ensures timely access to medically necessary care.

At issue in *Chaoulli* were provisions in Quebec legislation which prohibited anyone from contracting for private insurance for a service that was available through the public system, and which prohibited payment for services that were insured hospital services.¹⁰ Dr. Jacques Chaoulli, a doctor who wanted to offer private health services, and George Zeliotis, a Quebec patient who had been on a waiting list for hip replacement surgery, challenged these provisions on the basis that they violated their rights to life, liberty and security of the person guaranteed by section 7 of the *Canadian Charter of Right and Freedoms*.¹¹

Although the majority of the Supreme Court upheld these claims, the Court did so on the basis of an argument that was somewhat more limited than that advanced by the appellants Chaoulli and Zeliotis. In particular, the Court did not accept the argument to the effect that the Charter guarantees an individual the right to choose between a public and a private provider of health care. Nor did the Court rule that there was a constitutional right to the establishment of a parallel privately funded health care system. Rather, the focus of the two majority

⁸ See, for example, Sujit Choudhry, “Worse than Lochner?”, in Colleen Flood, Kent Roach & Lorne Sossin, *Access to Care, Access to Justice: The Legal Debate over Health Care in Canada* (University of Toronto Press, 2005), at 75; Allan Hutchinson, “Condition Critical: The Constitution & Health Care”, in Flood, Roach and Sossin, *id.*, at 101.

⁹ I acknowledge that I acted as co-counsel in *Chaoulli* to the group of senators, led by Senators Michael Kirby and Marjory LeBreton, who intervened in the case.

¹⁰ See s. 15 of the *Health Insurance Act*, R.S.Q., c. A-29 and s. 11 of the *Hospital Insurance Act*, R.S.Q., c. A-28.

¹¹ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

judgments in the Supreme Court was on the lack of timely care in the public health care system.

The fundamental issue that was raised by the Court was whether it is constitutionally justifiable for governments to legislatively preclude a patient from seeking access to necessary medical treatment, when such treatment is not available in a timely manner in the public system. According to the judgment of McLachlin C.J. and Major J., the key difficulty is that the government and legislature established a monopoly on the provision of health care services and then failed to deliver care in a timely fashion:

By imposing exclusivity and then failing to provide public health care of a reasonable standard within a reasonable time, the government creates circumstances that trigger the application of s. 7 of the *Charter* ... The state has effectively limited access to private health care except for the very rich, who can afford private care without need of insurance. This virtual monopoly, on the evidence, results in delays in treatment that adversely affect the citizen's security of the person. Where a law adversely affects life, liberty or security of the person, it must conform to the principles of fundamental justice. This law, in our view, fails to do so.¹²

Later in the judgment, McLachlin C.J. and Major J. note that the question in the case is not whether single-tier health care is preferable to two-tier care. They further note that the prohibition on obtaining private health insurance might well be justifiable in circumstances where health care services are reasonable as to both quality and timeliness. But these prohibitions cannot be sustained where care is not being delivered in a reasonable and timely manner: "if the government chooses to act, it must do so properly."¹³

Similarly, Deschamps J. frames the question before the Court as being "whether Quebecers who are prepared to spend money to get access to health care that is, in practice, not accessible in the public sector because of waiting lists may be validly prevented from doing so by the state".¹⁴ Justice Deschamps acknowledges that the government

¹² *Chaoulli, supra*, note 3, at paras. 105-106.

¹³ *Id.*, at paras. 108 and 158.

¹⁴ *Id.*, at para. 4. It should be noted that Deschamps J. based her analysis on s. 9.1 of the Quebec *Charter of human rights and freedoms*, R.S.Q. c. C-12 and therefore did not find it necessary to rule on the question of whether the prohibitions in Quebec law were inconsistent with the Canadian Charter. Nevertheless, the reasoning and analysis in her judgment are equally applicable to the Canadian Charter and, indeed, mirror precisely the analysis and conclusions of McLachlin C.J. and Major J.

has the right to discourage the emergence of a parallel private health care system, but that the issue raised is excessive waiting times:

... when my colleagues ask whether Quebec has the power under the Constitution to discourage the establishment of a parallel private health care system, I can only agree with them that it does. But that is not the issue in the appeal. The appellants do not contend that they have a constitutional right to private insurance. Rather, they contend that the waiting times violate their rights to life and security. It is the measure chosen by the government that is in issue, not Quebecers' need for a public health care system.¹⁵

A variety of arguments were raised in support of the prohibitions on access to private care. One such argument was that the prohibitions were necessary in order to prevent the emergence of a parallel private system, since such a parallel system would then drain off human resources from the public plan as many physicians and other health care professionals left the public plan. This could lead to increased waiting times in the public plan and diminish the quality of care available to those who were not in a position to afford private insurance.

There were a number of clear answers to this argument. The first, and perhaps most obvious, was that the government was perfectly entitled to maintain the existing prohibitions and to suppress the emergence of a parallel private health care system, provided that it ensured that medically necessary care was available in the public system in a reasonably timely manner. What the government cannot do is attempt to have it both ways: it cannot legally require Canadians to access health care through a single-payer public system, and then fail to provide the care needed when Canadians are sick. As noted above, this was precisely the argument advanced by McLachlin C.J. and Major J., as well as by Deschamps J.

Further, where the government seeks to justify a measure as a “reasonable limitation” under section 1 of the Charter, it is common for the courts to consider whether a similar limit has been enacted in other countries with analogous political and legal systems. In the event that other analogous jurisdictions have *not* enacted the prohibition(s) in issue, this is usually regarded as evidence that the measure cannot be “demonstrably justified in a free and democratic society” since there are other alternatives available to achieve the desired objective(s). In

¹⁵ *Id.*, at para. 14.

Chaoulli both the majority judgments pointed out that very few jurisdictions have attempted to totally ban individuals from using their own resources to access medically necessary care, and yet these jurisdictions had properly functioning universal health care systems. Thus it can hardly be maintained that the prohibitions in question represent a minimal impairment of the rights of individuals who are forced to wait for medically necessary care in circumstances that can cause severe physical and psychological harm and even death.

When members of the Supreme Court of Canada disagree with each other, they normally do so in measured and polite tones. Not so in *Chaoulli*, where Binnie and LeBel JJ. issued a blistering dissent in the combative style more commonly associated with the U.S. Supreme Court. The dissenters charge that the majority judgments had proceeded on the basis of wholly political rather than legal argument. First, even conceding that waiting may constitute a problem for “*some* Quebecers in *some* circumstances”,¹⁶ there was no systematic evidence about the extent of wait times and, in any event, it was beyond the expertise of judges to determine what was a reasonable wait for care. “How many MRIs does the Constitution require?”, they ask rhetorically.¹⁷

Second, they point out that there was extensive evidence at trial supporting the conclusion that a “U.S. two-tier system of health coverage” would have a negative impact on wait times in the public system. For example, there was evidence from other jurisdictions suggesting that parallel private insurers would “skim the cream” by siphoning off high-income patients while shying away from patients who constitute a higher financial risk, with the result that the public system would carry a disproportionate burden of patients considered high risk. Even if this evidence was contested or controversial, it had been accepted by the trial judge, who had concluded that the creation of a parallel private system would harm the public system. In Binnie and LeBel JJ.’s view, the Supreme Court of Canada ought to defer to governments and legislatures, as well as to the trial judge, on these complex policy matters.

Significantly, Binnie and LeBel JJ. did not provide a response to the principled argument in the majority judgments that if a government wishes to establish a monopoly over the provision of certain medically

¹⁶ *Id.*, at para. 207 (emphasis in original).

¹⁷ *Id.*, at para. 163.

necessary services, it thereby comes under an obligation to provide care in a timely manner. It is certainly true, as the dissenting justices suggest with their rhetorical question regarding MRIs, that the determination of reasonable waiting times requires a difficult exercise of judgment. But the fact that such a determination is difficult does not mean that governments and health care administrators should thereby be relieved of any obligation to provide care in a timely manner. By way of analogy, the fact that it may be difficult to determine what constitutes an acceptable speed on a highway does not mean that governments would thereby be justified in abolishing speed limits. Of course, just as speed limits on the highways are fixed by traffic experts rather than the courts, the determination of acceptable wait times must be made by qualified medical professionals rather than judges; what the courts can mandate is simply that there must be enforceable limits on waiting time determined by qualified medical professionals, if the state wishes to establish a universal, single-payer delivery model and prohibit individuals from accessing private care.

What is the significance of the fact that *Chaoulli* was a 4-3 decision of the Supreme Court of Canada, with one of the members of the majority (Deschamps J.) relying on the Quebec *Charter of human rights and freedoms*¹⁸ to strike down the Quebec legislation, and declining to rule on the issue of whether the impugned legislation also violated the Canadian Charter? In this sense, the six members of the Supreme Court who dealt with the Canadian Charter split 3-3 on the issue of whether the Quebec legislation violated the Canadian Charter. Could it therefore be argued that the principle of patient accountability which I have outlined in this paper applies only in the province of Quebec, and that it remains an open question as to whether the Supreme Court's principled approach applies in the other provinces and territories?

In fact, I do not believe that this outcome is either legally or politically sustainable. First, while it is true that Deschamps J. relied upon the Quebec Charter rather than the Canadian Charter to rule the impugned provisions to be invalid, the arguments she utilized were identical to those adopted by McLachlin C.J. and Major J. in their Charter analysis, and were diametrically opposed to the position of dissenting Justices Binnie and LeBel. Thus, while her judgment was technically limited to the Quebec Charter, it is legally implausible to

¹⁸ R.S.Q. c. C-12.

read her reasoning as supporting a different conclusion under the Canadian Charter.

More fundamentally, post-*Chaoulli* it is simply not sustainable politically for political leaders outside of Quebec to suggest that their citizens lack basic rights to timely care that are available in Quebec. In fact, the political discussions that have occurred over the past year have implicitly accepted that the result in *Chaoulli* applies across the country, rather than in a single province.¹⁹ There is strong popular support for *Chaoulli* in all provinces and across all income and age groups²⁰ and, with the aging of the population, political pressure and demand for timely medical care will only increase rather than diminish.

2. Other Successful Charter Cases

There were two other successful Charter cases in 2005, *Solski*²¹ and *Toronto Star*.²² In *Solski*, the court used section 23 of the Charter to “read down” the requirement in section 73 of the Quebec *Charter of the French language*,²³ which limited access to English-language education in Quebec to those children who had received the “major part” of their education in English; the Court held that children who had received a “substantial part” of (rather than a “majority of”) their education in the minority language should be deemed to satisfy the “major part” requirement in section 73 of the *Charter of the French language*. This narrowing of section 73 would not appear to have a material impact on access to English-language education in Quebec. The *Toronto Star* case affirmed that once executed, search warrants are presumptively public documents absent serious risk to the administration of justice, and that the *Dagenais/Mentuck* test²⁴ remains the appropriate means of applying this criterion. This carried forward the principle recognized in other

¹⁹ Thus in the discussions in the health policy community in recent months, health care administrators have accepted that they are bound to respond to *Chaoulli* and have discussed the ways in which this is occurring in all provinces and territories. See, for example, Brian Postl, *Final Report of the Federal Advisor on Wait Times* (June 2006) available at: <<http://www.hc-sc.gc.ca>>.

²⁰ See, for example, Ipsos-Reid, “Canadian Views on Health Care Scenarios” (June 7, 2006), available at: <<http://www.ipsos-na.com>>.

²¹ *Supra*, note 3.

²² *Supra*, note 3.

²³ R.S.Q., c. C-11.

²⁴ *Dagenais v. Canadian Broadcasting Corp.*, [2005] S.C.J. No. 104, [1994] 3 S.C.R. 835; *R. v. Mentuck*, [2001] S.C.J. No. 73, [2001] 3 S.C.R. 442.

cases to the effect that court proceedings and documents are presumptively open to public scrutiny.

3. Unsuccessful Charter Cases

There were a total of 11 decisions where Charter claims failed in 2005. Seven of these were criminal cases involving: RIDE programs;²⁵ the admissibility of wiretap evidence;²⁶ the right to challenge jurors for racial bias;²⁷ the right to cross-examine affiants in wiretap authorizations;²⁸ the cross-examination of accused on prior inconsistent statements;²⁹ and a mandatory firearm prohibition order in the *Criminal Code*.³⁰ Charter claims also failed in two freedom of expression cases,³¹ an immigration case involving a section 7 claim,³² and a section 23 case from Quebec.³³ The latter case, *Gosselin*, was significant in that it

²⁵ *C. (D.)*, *supra*, note 3: First Nations constables may set up RIDE programs outside reserves; therefore, the accused was not arbitrarily detained contrary to s. 9. *Orbanski*, *supra*, note 3: Police may question motorists about their drinking and administer roadside screening device tests without providing the opportunity to retain counsel — this limit on s. 10(b) is justified under s. 1.

²⁶ *Chow*, *supra*, note 3: Wiretap evidence is admissible (in accordance with s. 8) despite the fact that the accused was not “named” in wiretap authorizations. Further, the accused is not entitled to a separate trial to compel co-accused to testify.

²⁷ *Spence*, *supra*, note 3: Counsel for the accused does not have a right to challenge jurors on the basis of sympathy for the race of the victim of the alleged crime.

²⁸ *Pires*, *supra*, note 3: Affirms the right to cross-examine the affiant in proceedings to obtain wiretap authorization subject to *Garofoli* test (reasonable likelihood that cross-examination will elicit evidence of probative value) [*R. v. Garofoli*, [1990] S.C.J. No. 115, [1990] 2 S.C.R. 1421].

²⁹ *Henry*, *supra*, note 3: Section 13 does not preclude cross-examination of the accused on prior inconsistent statements based on *voluntary* testimony from an earlier trial on the same indictment; s. 13 only applies to compelled testimony.

³⁰ *Wiles*, *supra*, note 3: The mandatory 10-year firearms prohibition required by s. 109(1) of the *Criminal Code*, R.S.C. 1985, c. C-46 does not constitute “cruel and unusual” punishment and therefore does not violate s. 12.

³¹ *UL Canada*, *supra*, note 3: Provincial legislation regulating the colour of margarine does not limit freedom of expression; *Montreal (City)*, *supra*, note 3: Noise by-law limits freedom of expression but is justified under s. 1.

³² *Medovarski*, *supra*, note 3: In cases where an individual is convicted of a serious crime, the removal of the right of appeal against a deportation order does not violate s. 7; deportation of a non-citizen does not in itself violate s. 7.

³³ *Gosselin*, *supra*, note 3: Claim that s. 73 of the Quebec *Charter of the French language*, which provides access to English-language schools under certain circumstances, is discriminatory; parents who were part of the French-speaking majority wanted their children to attend English-language schools. The Court held that this was beyond the purpose of s. 23 of the Charter; if accepted, this argument would effectively eliminate the compromise contained in s. 23.

clarified that minority-language education rights in Quebec do not extend to French-speaking parents in Quebec.

II. FEDERALISM CASES

The court handed down decisions on eight federalism cases in 2005 and in all of these cases the constitutional challenge or claim was unsuccessful. *Imperial Tobacco*³⁴ and *Rothmans*³⁵ saw challenges to the provincial regulation of the tobacco industry turned back, while *Reference re EIA*³⁶ saw federal maternity and parental leave benefits upheld.

The *Imperial Tobacco* case was particularly significant. First, it clarified the Court's approach to the interpretation of the "in the province" requirement in section 92 of the *Constitution Act, 1982*. At issue in the case was the validity of a provincial statute which made extra-provincial manufacturers of tobacco products liable for health care costs incurred in British Columbia in respect of tobacco-related diseases. It was argued that the law was directed at matters outside the province of British Columbia, since the head offices and decision-making of the tobacco manufacturers were located outside B.C. The Court rejected this challenge, however, noting that there were strong relationships among the enacting territory (British Columbia), the subject matter of the law (compensation for the government of British Columbia's tobacco-related health care costs) and the persons made subject to it (the tobacco manufacturers ultimately responsible for those costs). Further, the Act respected the legislative sovereignty of other jurisdictions. This was because the cause of action related to

³⁴ *Supra*, note 4: The *Tobacco Damages and Health Care Costs Recovery Act*, S.B.C. 2000, c. 30 authorizes the government of British Columbia to bring an action against tobacco manufacturers to recover health care costs. This Act was held to be a constitutionally valid exercise of provincial power because it is meaningfully connected to the province and there are strong relationships among the enacting territory, the subject matter and the persons to whom it applies.

³⁵ *Rothmans*, *supra*, note 4: Provincial legislation banning the display of tobacco products is not inconsistent with a federal provision allowing the display; the federal provision merely circumscribes a more general prohibition in federal law and is not frustrated by the application of provincial law.

³⁶ *Supra*, note 4: Challenge to ss. 22 and 23 of the *Employment Insurance Act*, S.C. 1996, c. 23 as valid exercise of federal power — the Act was held to be constitutional. The pith and substance of both parental and maternity benefits is to provide replacement income during an interruption of employment; replacement income falls under Parliament's jurisdiction granted in s. 91(2A) of the *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3.

expenditures by the government of British Columbia for the health care of British Columbians. No other jurisdiction could possibly assert a stronger connection to that cause of action than British Columbia. Thus the Act could apply to tobacco manufacturers even though their corporate decision-makers and manufacturing facilities might be located outside the province.

An additional challenge to the legislation in *Imperial Tobacco* was based on the fact that it applied retroactively, and it conferred certain advantages or established certain presumptions in favour of the Crown in proceedings brought under the Act. It was argued that these features of the legislation were inconsistent with the principle of the rule of law, which was said to require that legislation be prospective and general, and that legislation not confer special advantages on the government. The Supreme Court noted that there was no constitutional requirement of prospectivity or generality in legislation, nor was it improper for legislation to confer special advantages on the government. The Court also commented more generally on the appropriateness of seeking to challenge legislation on the basis of the principle of the rule of law:

The rule of law is not an invitation to trivialize or supplant the Constitution's written terms. Nor is it a tool by which to avoid legislative initiatives of which one is not in favour. On the contrary, it requires that courts give effect to the Constitution's text, and apply, by whatever its terms, legislation that conforms to that text.³⁷

One might have thought that these comments would close the door to future litigation on the basis of the constitutional principle of the "rule of law".³⁸ It should be noted, however, that the British Columbia Court of Appeal has subsequently ruled that it is possible to utilize the principle of the rule of law to challenge legislation which limits the access of citizens to the courts.³⁹ Thus it would be premature to conclude that *Imperial Tobacco* has completely closed the door to challenges to the

³⁷ *Imperial Tobacco*, *supra*, note 4, at para. 67.

³⁸ See also *Babcock v. Canada (Attorney General)*, [2002] S.C.J. No. 58, [2002] 3 S.C.R. 3 at 29; *Bacon v. Saskatchewan Crop Insurance Corp.*, [1999] S.J. No. 302, [1999] 11 W.W.R. 51 (C.A.); leave to appeal to S.C.C. denied June 1, 2000.

³⁹ See *Christie v. British Columbia (Attorney General)*, [2006] B.C.J. No. 252, 263 D.L.R. (4th) 582 (C.A.) (holding that a tax on legal services that had the effect of reducing citizen access to the courts was invalid as offending the principle of the rule of law, despite the Supreme Court ruling in *Imperial Tobacco*).

validity of legislation based on the principle of rule of law, although certainly the case narrows the width of any opening that might remain.

III. ABORIGINAL CASES

Two Aboriginal cases reached the Supreme Court in 2005, *Mikisew*⁴⁰ and *Marshall*.⁴¹ In *Mikisew*, the Crown failed to discharge its “obligation to consult” under section 35 when it unilaterally declared that a winter road would be shifted from reserve land to a track along its boundary. However, the court emphasized that the Crown’s duty in this case was relatively low and could be discharged by limited consultation in the future.

Marshall is an important decision because it affirms that Aboriginal title requires proof of exclusive occupation. The trial judges in this litigation⁴² had required proof of regular and exclusive use of the relevant lands to establish Aboriginal title. The Courts of Appeal held that this test was too strict and applied a less onerous standard of incidental or proximate occupancy. The Supreme Court of Canada affirmed that the approaches taken by the trial judges were correct, distinguishing claims of Aboriginal rights from those of title. Aboriginal title requires proof of Aboriginal practices that indicate possession similar to that associated with title at common law. The Court emphasized that such a determination must be made taking into account the Aboriginal perspective, and noted that exploiting the land, rivers or seaside for hunting, fishing or other resources may translate into Aboriginal title to the land if the activity was sufficiently regular and exclusive to comport with title at common law. However, the Court also found that more typically, seasonal hunting and fishing rights exercised in a particular area will translate to a hunting or fishing right rather than title. In this case, the trial judges had concluded that there was insufficient evidence of exclusive possession of the particular areas over which title was being claimed, and there was no claim advanced on the basis of an Aboriginal right to engage in particular activities. Therefore

⁴⁰ *Supra*, note 5.

⁴¹ *Supra*, note 5.

⁴² Although the Court issued a single judgment, it decided two separate cases, *R. v. Marshall*, arising from Nova Scotia, and *R. v. Bernard*, arising from New Brunswick; there were two separate trials and court of appeal decisions.

the Supreme Court reversed the Courts of Appeal and restored the trial judgments.

IV. OTHER CASES

There were a total of four cases dealing with judicial compensation in 2005, three of which were unsuccessful.⁴³ The Court clarified the fact that recommendations of salary review commissions are advisory rather than binding, and that the government could depart from these advisory committee recommendations if this is justified with “rational” reasons; this low threshold should be easy to meet and should therefore discourage litigation over judicial salaries in the future. In fact, although the claim advanced by the Quebec judges succeeded, the Court in effect provided a “road map” for provinces wishing to depart from future commission recommendations.⁴⁴

V. CONCLUSION

Perhaps the most striking feature of the Supreme Court’s constitutional cases in 2005 was the high degree of unanimity among members of the Court. The Court was unanimous in 25 of the 29 constitutional cases (86 per cent), which is the highest rate of unanimity in the last decade.⁴⁵ Five members of the court (McLachlin C.J., Major, Deschamps, Abella and Charron JJ.) did not dissent in a single constitutional case in 2005. In fact, the only closely divided decision in 2005 was *Chaoulli*, where the Court split 3-3 on the application of the Canadian Charter, with Deschamps J.’s ruling that the legislation at issue violated the Quebec Charter proving decisive. In the other 14 Charter cases, there were only two cases that featured dissents, *Orbanski*, where LeBel and Fish JJ. dissented in a 7-2 decision holding that police may question motorists about their drinking and administer roadside screening without providing access to counsel; and *Montréal*, where Binnie J. dissented in a 6-1 decision upholding the application of a municipal noise by-law. The only other dissent in the 2005 constitutional decisions came in *Castillo*, where the Court, by an 8-1 margin, upheld the application of a

⁴³ *Supra*, note 6.

⁴⁴ *Provincial Judges*, *supra*, note 6.

⁴⁵ *Supra*, note 2.

provision in Alberta's *Limitations Act*⁴⁶ over the dissent of Bastarache J. on federalism grounds. Of particular significance was the unanimity in the two Aboriginal cases, particularly the important *Marshall* case clarifying the application of the doctrine of Aboriginal title.

It is evident that the current Court has managed to achieve a relatively unusual degree of consensus. Moreover, the membership of the Court is likely to remain stable for the foreseeable future; although Rothstein J. joined the Court in early 2006, there are no additional retirements mandated until November 2013, when Fish J. reaches the mandatory retirement age of 75. Barring an unforeseen change in the interim, the current degree of consensus among the members of the Supreme Court of Canada may well be maintained for some time to come.

⁴⁶ R.S.A. 2000, c. L-12.