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Patrick J. Monahan

Osgoode Hall Law School of York University

James Gotowiec

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Constitutional Cases 2007: An Overview

Patrick J. Monahan and James Gotowiec*

I. INTRODUCTION

This volume of the *Supreme Court Law Review*, which consists of papers presented at Osgoode Hall Law School's 11th Annual Constitutional Cases Conference held on April 18, 2008, examines the constitutional decisions of the Supreme Court of Canada released in the calendar year 2007.¹ The Court handed down just 58 judgments in 2007,² the lowest number since the Court's "modern era" began in 1975.³ Before 2007, the McLachlin Court heard an average of 82 appeals per year, while the Lamer Court heard an average of 111 appeals every year. Constitutional cases made up 28 per cent of the Court's docket in 2007 (16 of the 58 decisions), which is consistent with recent trends. The majority of the constitutional cases (12 of 16 cases) were *Canadian Charter of Rights and Freedoms* cases,⁴ while the remaining four cases dealt with

* Patrick J. Monahan is a Professor of Law and Dean of Osgoode Hall Law School of York University. James Gotowiec, B.A. & Sc., is a Member of the LL.B. class of 2011, Osgoode Hall Law School, and the J.D. class of 2011, 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 1997-2007*, available online at <http://www.scc-csc.gc.ca/information/statistics/index_e.asp> [hereinafter "Statistics"].

³ The Supreme Court of Canada gained significant control over its docket in 1975 through amendments requiring the Court to grant leave to appeal for most civil cases.

⁴ *Baier v. Alberta*, [2007] S.C.J. No. 31, [2007] 2 S.C.R. 673 (S.C.C.) [hereinafter "Baier"]; *British Columbia (Attorney General) v. Christie*, [2007] S.C.J. No. 21, [2007] 1 S.C.R. 873 (S.C.C.) [hereinafter "Christie"]; *Canada (Attorney General) v. Hislop*, [2007] S.C.J. No. 10, [2007] 1 S.C.R. 429 (S.C.C.) [hereinafter "Hislop"]; *Canada (Attorney General) v. JTI-Macdonald Corp.*, [2007] S.C.J. No. 30, [2007] 2 S.C.R. 610 (S.C.C.) [hereinafter "JTI-Macdonald"]; *Charkaoui v. Canada (Citizenship and Immigration)*, [2007] S.C.J. No. 9, [2007] 1 S.C.R. 350 (S.C.C.) [hereinafter "Charkaoui"]; *Health Services and Support-Facilities Subsector Bargaining Assn. v. British Columbia*, [2007] S.C.J. No. 27, [2007] 2 S.C.R. 391 (S.C.C.) [hereinafter "B.C. Health Services"]; *Little Sisters Book and Art Emporium v. Canada (Commissioner of Customs and Revenue)*, [2007] S.C.J. No. 2, [2007] 1 S.C.R. 38 (S.C.C.) [hereinafter "Little Sisters No. 2"]; *Named Person v. Vancouver Sun*, [2007] S.C.J. No. 43, [2007] 3 S.C.R. 253 (S.C.C.) [hereinafter

federalism issues.⁵ No cases during calendar 2007 addressed Aboriginal constitutional issues.⁶

The 2007 term revealed a Court that was more divided and took more time to release lengthier decisions. Just 63 per cent of judgments were unanimous in 2007, the lowest since the mid-1990s and a departure from the McLachlin Court's overall average of 75 per cent. A greater number of dissents together with multiple concurring reasons led to longer judgments — an average of 44.8 pages per appeal, the highest in the past 20 years. The time from hearing a case to releasing a decision also increased to an average of 6.6 months, compared to a mean of 5.3 months since 2000.

II. CHARTER CASES

The Court was not particularly receptive to Charter claims in 2007, with only three of 12 cases (25 per cent) succeeding.⁷ This is somewhat of a decline from the average success rate in the recent past; since McLachlin J. was elevated to Chief Justice on January 7, 2000, Charter claimants have succeeded in 50 out of 114 cases (44 per cent) at the Supreme Court. However, the results from 2007 are not a significant departure from longer-term trends, as approximately one out of every three Charter claims has been successful at the Supreme Court over the past two decades.⁸

While the number of successful Charter cases in 2007 was low, the three cases in which the claimants did succeed (*Charkaoui, B.C. Health*

"Named Person"]; *R. v. Bryan*, [2007] S.C.J. No. 12, [2007] 1 S.C.R. 527 (S.C.C.) [hereinafter "Bryan"]; *R. v. Clayton*, [2007] S.C.J. No. 32, [2007] 2 S.C.R. 725 (S.C.C.) [hereinafter "Clayton"]; *R. v. Hape*, [2007] S.C.J. No. 26, [2007] 2 S.C.R. 292 (S.C.C.) [hereinafter "Hape"]; *R. v. Singh*, [2007] S.C.J. No. 48, [2007] 3 S.C.R. 405 (S.C.C.) [hereinafter "Singh"]; *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter "Charter"].

⁵ *British Columbia (Attorney General) v. Lafarge Canada Inc.*, [2007] S.C.J. No. 23, [2007] 2 S.C.R. 86 (S.C.C.) [hereinafter "Lafarge"]; *Canadian Western Bank v. Alberta*, [2007] S.C.J. No. 22, [2007] 2 S.C.R. 3 (S.C.C.) [hereinafter "Canadian Western Bank"]; *Dunne v. Quebec (Deputy Minister of Revenue)*, [2007] S.C.J. No. 19, [2007] 1 S.C.R. 853 (S.C.C.) [hereinafter "Dunne"]; *Kingstreet Investments Ltd. v. New Brunswick (Finance)*, [2007] S.C.J. No. 1, [2007] 1 S.C.R. 3 (S.C.C.) [hereinafter "Kingstreet"].

⁶ While the Court did release decisions dealing with Aboriginal rights issues in 2007, none of them addressed the interpretation or application of a provision of the Constitution of Canada.

⁷ A Charter claim is treated as being successful when the claimant receives some form of relief under s. 24 of the Charter, or where a statute or other legal rule is declared to be inconsistent with the Constitution of Canada under s. 52 of the *Constitution Act, 1982*.

⁸ See Patrick J. Monahan & Evan Van Dyk, "Constitutional Cases 2004: An Overview" (2005) 29 S.C.L.R. (2d) 1, at 2.

Services and *Hislop*) set what may prove to be important precedents. In particular, the *Hislop* case develops a new framework for determining whether Charter remedies should be granted on a retroactive basis, a framework that will likely prove difficult to apply and may generate uncertainty for both claimants and governments. (Both *Charkaoui*, dealing with the constitutional validity of the *Immigration and Refugee Protection Act* security certificate regime, and *B.C. Health Services*, in which the Court ruled that Canadians have a constitutional right to engage in collective bargaining, are addressed in detail elsewhere in this volume and, accordingly, will not be dealt with here.)

Equally important were the 2007 cases in which Charter claims were unsuccessful. There were a total of five appeals dealing with freedom of expression claims under section 2(b), as well as two significant cases dealing with police powers. Another important theme that emerges from the 2007 term is an evident concern on the part of the majority of the Court with the potential cost implications flowing from the recognition of Charter claims. These developments are explored in some detail below.

1. Charter Remedies — *Canada (Attorney General) v. Hislop*

Hislop arose from a class action lawsuit challenging the federal government's July 2000 amendments to the *Canada Pension Plan* ("CPP")⁹ as a violation of section 15(1) of the Charter. The amending legislation, the *Modernization of Benefits and Obligations Act* ("MBOA"),¹⁰ had been enacted in response to the Supreme Court's ruling in *M. v. H.*¹¹ striking down the opposite sex definition of "spouse" in Ontario's *Family Law Act*. The MBOA made same-sex partners eligible for survivor's benefits under the *Plan*; however, it also added two new subsections that restricted the date on which same-sex survivors became entitled to benefits. Section 44(1.1) limited CPP eligibility to same-sex survivors whose contributing partner had died after January 1, 1998, while section 72(2) allowed no payments to same-sex survivors for any month before July 2000 (when same-sex survivors first became eligible under the CPP to apply for survivor's benefits).

⁹ R.S.C. 1985, c. C-8.

¹⁰ S.C. 2000, c. 12. The MBOA was an omnibus statute that amended 68 pieces of federal legislation to comply with the Court's ruling in *M. v. H.*, *infra*, note 11.

¹¹ [1999] S.C.J. No. 23, [1999] 2 S.C.R. 3 (S.C.C.), holding that the exclusion of same-sex couples from the definition of common law spouse under Ontario's *Family Law Act*, R.S.O. 1990, c. F.3 violated s. 15 and could not be justified under s. 1.

A class action was brought by a group of same-sex survivors (the “Hislop class”) challenging sections 44(1.1) and 72(2) of the CPP as a violation of their equality rights. The class made two other constitutional claims. They asserted that the application of the general rule of section 72(1), which restricts all retroactive benefit claims (from both same-sex and opposite-sex survivors) to 12 months from the date of application had an adverse effect on same-sex survivors as they had been unable to apply for benefits before July 2000. They also challenged the application of section 60(2), which required the estates of survivors of same-sex relationships to submit claims to benefits within 12 months of the death of the survivor.

The Court ruled 7-0 that the limitations prescribed by sections 44(1.1) and 72(2) of the CPP violated section 15(1) of the Charter and could not be upheld under section 1. Its reasoning on these issues was fairly straightforward and did not break any significant new ground. With respect to the limitation in section 44(1.1) (which provided that only those claimants whose contributing partners had died after January 1, 1998 were eligible for benefits), the only difficult legal issue was the correct choice of comparator group. The Attorney General of Canada had argued that the legislation did not distinguish between same-sex and opposite-sex couples but, rather, between two groups of same-sex couples: those where the contributing partner died prior to, as opposed to later than, January 1, 1998. The Supreme Court rightly rejected this argument, holding that what must be compared is the subset of same-sex survivors who remain excluded from CPP survivors’ benefits, along with similarly situated opposite-sex survivors. This meant that the appropriate comparator group consisted of opposite-sex survivors whose contributing partner had died prior to January 1998. Having made this determination, the Court concluded that excluding same-sex survivors whose partners had died prior to January 1998 from applying for CPP benefits violated the Court’s established tests under section 15 and could not be justified under section 1.

With respect to section 72(2), which precluded claims for same-sex benefits for periods prior to July 2000, the Court noted that there were general provisions elsewhere in the legislation limiting claims for retroactive benefits to 12 months from the date of application. This general limitation provided an answer to concerns about the potential costs associated with claims for same-sex survivors’ benefits reaching extensively into the past. The Court therefore was unable to discern a compelling justification for precluding entirely any benefits claims for

periods prior to July 2000. The effect of eliminating section 72(2) was that it would be possible for same-sex survivors to claim pension arrears from as early as August 1999 (*i.e.*, 12 months prior to the coming into force of the MBOA.)

The real significance of *Hislop* came in its analysis of section 72(1), the general provision limiting claims for retroactive CPP benefits to a maximum of 12 months. The claimants were not seeking a declaration that this provision was invalid in its entirety. Rather, they sought a constitutional exemption from the limitation on arrears, so that same-sex survivors would be able to claim arrears for the period between 1985 and 2000.

The majority reasons of LeBel and Rothstein JJ. (concurring in by four others), noted that declarations of invalidity often have retroactive effect. This is because an invalid law is generally invalid from the outset, meaning that any prior government actions or decisions taken on the basis of such a law will also be invalid. This is a straightforward application of principles associated with the rule of law, which holds that government actions require proper legal authorization to have binding effect.

So far so good. But the majority opinion of LeBel and Rothstein JJ. moves on to more questionable ground by suggesting that the retroactive effect of a constitutional declaration of invalidity arises from the 18th-century writings of jurist William Blackstone, rather than principles associated with the rule of law. According to LeBel and Rothstein JJ., constitutional remedies have retroactive effect because of Blackstone's "declaratory approach", which holds that judges do not create law but merely discover it. Because judges merely "rediscover rules which are deemed to have always existed"¹² it is appropriate to grant retroactive effect to declarations of invalidity. This leads the majority opinion to the further conclusion that, where courts operate "outside of the Blackstonian paradigm" (when "judges are fashioning new legal rules or principles and not when they are applying existing law"),¹³ then it may be appropriate for the court to issue a prospective rather than a retroactive remedy.

The difficulty with this remedial framework is that it depends on a questionable distinction between cases in which courts are merely "discovering" law, as opposed to those in which courts are creating new

¹² *Hislop*, *supra*, note 4, at para. 84, *per* LeBel and Rothstein JJ.

¹³ *Id.*, at para. 86.

law. Virtually all cases that reach the Supreme Court of Canada involve some significant creative legal element. Thus it would appear extremely difficult and problematic to distinguish between cases in which courts are merely “declaring the law as it existed” as opposed to those in which it is “developing new law”. The majority opinion seems to acknowledge this difficulty, by suggesting that prospective (as opposed to retroactive) remedies will be appropriate in cases involving a “substantial change in the law”.¹⁴ Moreover, even where there has been a “substantial change in the law”, LeBel and Rothstein JJ. suggest that it is necessary to take into account a range of other contextual factors and considerations, including whether there has been reasonable or good faith reliance by government, fairness to litigants and whether a retroactive remedy would unduly interfere with the allocation of scarce public resources by governments.¹⁵ However, in cases involving the collection of taxes based on unconstitutional statutes, the funds must be returned retroactively, regardless of whether there has been a substantial change in the law.¹⁶

In *Hislop*, the majority held that while the “substantial change in the law” test was met, the contextual factors weighed against a retroactive remedy. The majority viewed the Hislop class’s arguments as a claim for compensatory damages flowing from the underinclusiveness of the CPP and, in the absence of bad faith, unreasonable reliance by government, or conduct that was clearly wrong, such a remedy was inappropriate. Given that the remedy the class was seeking was unavailable, LeBel and Rothstein JJ. found it unnecessary to consider the constitutionality of section 72(1).

The concurring opinion of Bastarache J. reaches the same result but by a much more direct and simple route. Justice Bastarache points out that the basis for the general retroactivity of constitutional remedies is not the Blackstonian declaratory theory but the Constitution itself: any law that is inconsistent with the Constitution of Canada is invalid from the outset, and government decisions taken in reliance on invalid legislation have no legal foundation. However, Bastarache J. goes on to suggest that there may be cases where countervailing considerations argue against the normal rule that constitutional remedies operate retrospectively as well as prospectively. This was precisely such a case, since the effect of ordering the payment of CPP benefits retroactively to

¹⁴ *Id.*, at para. 99.

¹⁵ *Id.*, at para. 100.

¹⁶ *Id.*, at para. 108.

1985, with interest, would have involved significant disruption to public finances while conferring a huge windfall on a limited number of beneficiaries. In the result, Bastarache J. agreed with the majority that the remedy should be prospective only in this case.

The majority opinion of LeBel and Rothstein JJ., holding that the courts do commonly make substantial changes in the law, is an unusually candid acknowledgement of the creative role of courts in Charter adjudication. Unfortunately, it appears to have complicated, rather than simplified, the issue of when retroactive Charter relief is appropriate. The “substantial change in the law” test will likely prove to be difficult to apply in practice, and will likely result in more litigation to establish exactly what qualifies as a significant change in the law. Justice Bastarache’s analysis demonstrates that it is possible to arrive at the same result, using substantially the same criteria as the majority, without engaging in an inquiry of whether a recent legal decision has involved a “significant” break with the past. It remains to be seen whether the remedial framework articulated by the majority in *Hislop* is widely applied in future cases.

2. Freedom of Expression

The Court heard five cases related to section 2(b) freedom of expression claims in 2007, all of which were unsuccessful.¹⁷ The Court’s established approach to freedom of expression claims is to give a broad definition to the right, and to consider any limitations on free expression through balancing under section 1. The 2007 section 2(b) decisions revealed a slight departure from that approach, and a greater willingness to dispose of free expression claims on the basis of a categorical test rather than balancing.

¹⁷ *Baier, supra*, note 4: an Alberta law requiring teachers running for school board trustee positions to take a leave of absence does not violate s. 2(b); *JTI-Macdonald, supra*, note 4: the government’s restrictions on tobacco advertising, contained in the *Tobacco Act*, S.C. 1997, c. 13 and *Tobacco Products Information Regulations*, SOR/2000-272 violated s. 2(b) but were saved under s. 1; *Little Sisters No. 2, supra*, note 4: advanced cost awards for continuing litigation will be granted only in rare and exceptional circumstances, where the case is sufficiently important that denying the application would be “contrary to the interests of justice”; *Named Person, supra*, note 4: the right that police informers have to protection of their identities in court trumps free expression claims; *Bryan, supra*, note 4: sections of the *Canada Elections Act*, S.C. 2000, c. 9 prohibiting the transmission of election results from one riding into a riding with open polling stations are constitutional.

For example in *Named Person*, during an *in camera* portion of an extradition hearing the person who was the subject of the proceeding notified the judge that he was a confidential police informer. The court appointed an *amicus curiae* and heard submissions as to whether the extradition proceedings should continue *in camera*. The court eventually invited a number of media representatives to make submissions as to whether the “open court” principle, protected by section 2(b), took precedence over the protection of the identity of police informers. Justice Bastarache, writing for eight members of the Court, found that the informer privilege must remain absolute, and therefore any information that can be used to identify an informant cannot be revealed, “except where the innocence of a criminal accused is at stake”.¹⁸ A court has no discretion in deciding whether to apply the rule; Bastarache J. noted that “the duty of a court not to breach the privilege is of the same nature as the duty of the police or the Crown”.¹⁹ There was therefore no need to balance the protection for police informers with the “open court” principle.

Similarly, in *Baier* the Court considered a requirement that school employees seeking election as school trustees take an unpaid leave of absence in order to run for office, and resign if elected. This requirement was challenged on the basis that it limited the employees’ claims to expressive freedom.²⁰ Eight members of the Court, in two separate concurring opinions, found that there was no violation of section 2(b) and therefore no need to consider section 1. The majority opinion of Rothstein J. relied on the fact that the claimants were seeking a positive rather than a negative right; in this case, they sought access to the statutory platform of school trustee candidacy and school trusteeship. Justice Rothstein held that this claim failed to satisfy the *Dunmore* criteria as to the limited circumstances in which a positive right could qualify for Charter protection.²¹ Justice LeBel, on behalf of two others,

¹⁸ *Named Person*, *supra*, note 4, at para. 4.

¹⁹ *Id.*, at para. 21.

²⁰ The limitation was also challenged on the basis of a violation of s. 15(1), but this claim was dismissed on the basis that the distinction drawn by the legislation did not involve a ground that was “enumerated or analogous” to the grounds identified in s. 15.

²¹ *Dunmore v. Ontario (Attorney General)*, [2001] S.C.J. No. 87, [2001] 3 S.C.R. 1016, at paras. 24-26 (S.C.C.). In *Dunmore* the Court had held that in cases where it is alleged that a statutory regime is underinclusive, the claim must be grounded in “fundamental Charter freedoms rather than in access to a particular statutory regime”; the claimant must also show that exclusion from the regime has the effect of substantial interference with an activity protected under s. 2(b); finally, the purpose of the exclusion must not be to interfere with freedom of expression, but must

held that the claim concerned a democratic right (to run for school board trustee) that the Charter did not protect, meaning section 2(b) was inapplicable to the case. In the rest, by an 8-1 margin, the Court did not find it necessary to proceed to a consideration of section 1 of the Charter. (Justice Fish dissented, arguing that excluding a group of qualified persons from serving on democratically elected boards violated section 2(b) and could not be justified under section 1.)

Finally, in *Little Sisters No. 2*, the Court by a 7-2 majority held that orders for advance costs should be made only in “rare and exceptional” cases. Vancouver’s Little Sisters Book and Art Emporium has fought a series of protracted legal battles with Canada Customs over the agency’s detention of ostensibly obscene materials at the border. Despite the owners’ partial success before the Supreme Court in *Little Sisters No. 1*,²² Customs has continued to detain materials destined for the store. Little Sisters challenged Customs’ classification of four titles as obscene in the B.C. Supreme Court. During the litigation at the trial level, the store owners brought an application for an advance costs award, claiming they could not afford to continue the case. The trial judge granted the application, and Customs appealed the order. The B.C. Court of Appeal allowed the appeal, setting aside the costs award. Little Sisters appealed to the Supreme Court, which dismissed the appeal.

The main majority opinion of Bastarache and LeBel JJ. noted that public interest advance costs orders should be approached with great caution and only granted as a last resort where their necessity is clearly established. The concurring opinion of McLachlin C.J.C. and Charron J. appeared to set the bar even higher, holding that an order for advance costs should be made only in “special circumstances making this extraordinary exercise of the court’s power appropriate”.²³ The two majority opinions narrowed the scope of the Court’s earlier holding in *Okanagan*, where advance costs had been awarded to four Indian bands involved in a logging dispute with the British Columbia government.²⁴ The Court described *Okanagan* as a case where there was “an exceptional convergence of factors” justifying an advance costs order, and emphasized

be in furtherance of some other legitimate objective. Justice Rothstein held that none of these three criteria was satisfied in this instance.

²² *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [2000] S.C.J. No. 66, [2000] 2 S.C.R. 1120 (S.C.C.).

²³ *Little Sisters No. 2*, *supra*, note 4, at para. 88.

²⁴ *British Columbia (Minister of Forests) v. Okanagan Indian Band*, [2003] S.C.J. No. 76, [2003] 3 S.C.R. 371 (S.C.C.).

that the case involved an “evolutionary step, but not a revolution, in the exercise of the courts’ discretion regarding costs”.²⁵

3. Other Charter Cases

The categorical approach favoured in a number of the Court’s freedom of expression claims was evident in other cases in the 2007 term as well, notably *Hape*. In *Hape*, the RCMP had commenced an investigation into suspected money laundering activities by a Canadian businessman, who was later charged with money laundering. They obtained permission from the Turks and Caicos Islands authorities to conduct part of the investigation on the Islands, where the accused had an investment company. During the investigation the RCMP conducted a number of searches (some without warrants) of the accused’s offices on the Islands.²⁶ The accused sought to have the documentary evidence obtained excluded on the basis that it had been obtained in violation of his rights under section 8 of the Charter.

The Court ruled 9-0 (but with three sets of reasons) that there was no Charter violation in this case. For a five-member majority, LeBel J. concluded that the Charter does not apply to Canadian officials operating in another jurisdiction, with very rare exceptions.²⁷ Where there is an attempt to adduce evidence at a Canadian trial obtained through a foreign search, the court should base its decision on the need to ensure the fairness of a trial. This requirement follows from the Charter provisions guaranteeing trial fairness in Canada (sections 7 and 11(d)) and does not involve the extraterritorial application of the Charter. In this case, LeBel J. concluded that the Charter did not apply to the searches themselves; moreover, in his view admitting the evidence obtained during the searches would not result in an unfair trial and therefore there was no violation of section 7 or section 11(d). Justice Bastarache, for two other justices, held that the Charter could apply

²⁵ *Little Sisters No. 2*, *supra*, note 4, at para. 34.

²⁶ While no warrants were admitted into evidence during the trial (and none had been secured for the perimeter surveillance of Hape’s office), the RCMP officers testified that they had relied on the expertise of the detective in charge of criminal investigations on the Islands, and had understood that warrants had been obtained for several covert searches performed at the office. See *Hape*, *supra*, note 4.

²⁷ One exception would be if the foreign state consented to the application of Canadian law, including the Charter, on its territory (*id.*, at para. 106); a second exception would arise if the activity by Canadian state actors would place Canada in violation of its international human rights obligations (*id.*, at para. 101).

extraterritorially, but agreed with the disposition in this case on the basis that Hape had not established that the search was unreasonable, in light of the local laws which governed searches of accused premises. In Bastarache J.'s opinion, therefore, section 8 of the Charter applied to the searches but had not been breached. Justice Binnie wrote a brief set of reasons concurring in the result but disassociating himself from what he described as LeBel J.'s "[c]onstitutional pronouncements of such far-reaching implications",²⁸ and arguing that this case did not afford "a proper springboard for such sweeping conclusions".²⁹

The potential implications of *Hape* were made apparent just months later in the *Amnesty International Canada* case, in which the Federal Court held that the Charter did not apply to military transfers by Canadian authorities of Afghan detainees.³⁰ On this basis, Mactavish J. dismissed an application for judicial review of the transfers. Yet in May of 2008, the Supreme Court unanimously ruled in *Khadr* that one of the exceptions identified in *Hape* applied to interrogations being conducted by Canadian officials at the U.S. military base in Guantanamo Bay, Cuba.³¹ In particular the Court relied on the fact that the process in place at Guantanamo Bay had been found by the U.S. Supreme Court to violate U.S. domestic law and international human rights obligations to which Canada subscribes. Therefore the normal rule to the effect that the Charter did not apply to activities on foreign soil was inapplicable, and Omar Khadr was entitled to disclosure of documents in possession of the Canadian government relevant to charges he was facing under U.S. law.

What was unusual about *Khadr* was that there had been a prior ruling by the highest domestic court in the jurisdiction (here the U.S. Supreme Court), based on a full factual record, that the activities in question violated international law. In the absence of such a prior ruling (which will most often be the case), to what extent will the courts require a separate proceeding to consider the application of international human rights law, before ruling on whether the Charter applies to activities in a

²⁸ *Id.*, at para. 189.

²⁹ *Id.*, at para. 182. Justice Binnie noted that the so-called "war on terror" involved considerable activity by Canadian government or military officials on foreign soil. In his view it was preferable to have a proper factual record and complete legal argument on whether the Charter should apply in such circumstances.

³⁰ *Amnesty International Canada v. Canada (Canadian Forces)*, [2008] F.C.J. No. 356, 2008 FC 336 (F.C.). Interestingly, Binnie J. in his dissent in *Hape* had referenced the litigation on this issue, and indicated that the Supreme Court should not foreclose the potential application of the Charter to this activity. See *Hape*, *supra*, note 4, at para. 184.

³¹ *Canada (Justice) v. Khadr*, [2008] S.C.J. No. 29, 2008 SCC 29 (S.C.C.).

foreign jurisdiction? If such separate proceedings are commonly entertained, this would clearly limit the application of *Hape*, which seemed to create a categorical rule against the extraterritorial application of the Charter.

The Court handed down two significant cases dealing with police powers in 2007, both of which sided with law enforcement. The first of these, *R. v. Clayton*, raised the question of whether a roadside stop and detention violated section 8 or section 9 of the Charter. Police officers, responding to an early-morning 911 call warning that individuals in a number of vehicles were displaying handguns, had stopped a vehicle and detained the occupants. The Ontario Court of Appeal had quashed the trial convictions in the case, holding that the roadblock was unlawful because there was no imminent danger, and the vehicle that was stopped was not one of the vehicles that had been identified in the 911 call that brought police to the scene. Justice Abella, for a six-member majority, restored the convictions, finding that there was no violation of section 8 or section 9 of the Charter and, therefore, no need to consider the application of section 24 or section 1. Justice Abella reasoned that in assessing whether searches incident to an investigative detention violated the Charter, it was necessary to consider whether the stop and search were no more intrusive than reasonably necessary. In particular, searches can be justified if an officer believes reasonably that his or her safety, or that of others, is at risk. Here the police had reasonable grounds to believe that there were several handguns in a public place. This represented a serious offence accompanied by genuine risk to the public, and justified a search of the vehicle in question even though it had not been described in the 911 call.

The Court was more closely divided in *Singh*, one of only two constitutional cases to be decided by a 5-4 majority in 2007.³² The accused was arrested for second degree murder in respect of the shooting death of an innocent bystander who was killed by a stray bullet while standing just inside the doorway of a pub. Singh was advised of his right to counsel and stated 18 times during the course of interviews that he did not want to talk to police. Nevertheless the police continued their questioning. Although he did not confess to the crime, he made a number of admissions which, when taken together with other evidence, were probative of the issue of identification. Singh challenged the admissibility of the statements on the basis of a violation of his right to silence under section 7. Justice Charron, writing for a five-person

³² The other was *R. v. Bryan*, *supra*, note 4.

majority of the Court, found that there was no “rigid requirement” that police refrain from questioning a detainee who states that he or she does not wish to speak to police. To impose a general prohibition of this kind would ignore the state interest in the effective investigation of crime. Justice Charron emphasized that the fundamental question remained whether the statement was made voluntarily. While persistence in continuing an interview in the face of protestations from the accused that he wished to remain silent might give rise to a “strong argument” that the statement was not made voluntarily, the trial judge in this case found Singh’s statement to have been made freely and there was no basis to interfere with that finding.

Justice Fish authored a vigorous dissent on behalf of four members of the Court, arguing that intense questioning over suspects’ protests deprived them of their right to silence. According to the dissenters, in a situation such as the one in which Singh found himself, where his continued resistance to questioning appeared useless, “ultimate submission proves neither true consent nor valid waiver”.³³ Justice Fish would have allowed the appeal and ordered a new trial.

Significantly, both *Clayton* and *Singh* arose from criminal activity involving guns or gun crime. There is widespread public concern in Canada over the extent of gun crime, particularly in major urban centres such as Toronto.³⁴ The majority opinions in both *Clayton* and *Singh* seem particularly sensitive to the need to ensure that the application of the Charter not unduly impede the ability of the police to investigate and prosecute gun crime.

The justices also demonstrated a good deal of sensitivity to the cost implications of their Charter rulings this past year. In *Hislop*, the Court indicated that it would be appropriate, in determining whether to make a Charter remedy retroactive, to consider the cost implications of such an order. Similarly, in *Christie*, a lawyer challenged the constitutionality of British Columbia’s legal service tax, arguing that the tax made it impossible for some of his low-income clients to afford his services. Christie argued the tax violated a constitutional right of access to justice that was based on the principle of the rule of law. In a *per curiam*

³³ *Singh*, *supra*, note 4, at para. 66.

³⁴ See, for example, John Barber, “Urbanites’ call for ban on guns hits deaf ears in Ottawa” *The Globe and Mail*, April 10, 2008, at A13 (reporting on the 16,000 residents who signed Toronto Mayor David Miller’s Internet petition to ban handguns in only four days); Lee Greenberg, “Murder rate growing in infamy” *Leader Post*, December 27, 2007, at D8 (reporting on the after-effects of Toronto’s 2005 “Year of the Gun”).

opinion, the Court disagreed, holding there was no general right to be represented by a lawyer in a court proceeding where legal rights or obligations are at stake. The justices held that “the fiscal implications of the right sought cannot be denied. ... It is a huge change that would ... impose a not inconsiderable burden on taxpayers”.³⁵

III. FEDERALISM CASES

The Court shifted its interpretation of the interjurisdictional immunity doctrine, and clarified its approach to issues of federal paramountcy, in a pair of important federalism cases. In both *Canadian Western Bank*³⁶ and *Lafarge*,³⁷ released concurrently, the Court significantly narrowed the interjurisdictional immunity doctrine, which limits the extent to which laws enacted by one level of government can affect matters falling within the exclusive jurisdiction of the other. The leading case on the scope of the interjurisdictional immunity doctrine had been Beetz J.’s opinion in *Bell Canada (1988)*,³⁸ which had held that provincial laws could not affect “integral and vital parts” of federally regulated undertakings, such as those in fields of interprovincial transportation or communication. The majority opinion of Binnie and LeBel JJ., writing for six members of the Court, held that Beetz J.’s approach in *Bell Canada (1988)* gave too broad a scope to the interjurisdictional immunity doctrine. Echoing sentiments expressed by former Chief Justice Dickson,³⁹ Justices Binnie and LeBel argued that this broad application of the doctrine was counter to the “dominant tide of constitutional interpretation” favouring the ordinary operation of statutes enacted by both levels of government; moreover, it “runs the risk of creating an unintentional centralizing tendency in constitutional interpretation”.⁴⁰ They proceeded to expound a more restrictive approach

³⁵ *Christie*, *supra*, note 4, at para. 14.

³⁶ *Supra*, note 5: Alberta amended its *Insurance Act*, R.S.A. 2000, c. I-3 in 2000 to apply a licensing scheme to banks that were selling insurance in the province. A number of banks challenged the law, arguing that according to the doctrine of interjurisdictional immunity it must be read down so as to not apply to federally regulated banks. The challenge was unsuccessful.

³⁷ *Supra*, note 5.

³⁸ *Bell Canada v. Québec (Commission de la santé et de la sécurité du travail)*, [1988] S.C.J. No. 41, [1988] 1 S.C.R. 749 (S.C.C.) [hereinafter “*Bell Canada (1988)*”].

³⁹ See, in particular, Dickson C.J.C.’s opinion in *OPSEU v. Ontario (Attorney General)*, [1987] S.C.J. No. 48, [1987] 2 S.C.R. 2, at 17 (S.C.C.).

⁴⁰ *Canadian Western Bank*, [2007] S.C.J. No. 22, [2007] 2 S.C.R. 3, at paras. 37 and 45 (S.C.C.).

to the doctrine of interjurisdictional immunity, reverting back to the law as it stood prior to *Bell Canada (1988)*. First, they suggested that the doctrine was of limited application and should generally be reserved for situations already covered by precedent.⁴¹ In practical terms, this meant that the doctrine would generally be applied only in respect of federal undertakings or entities that had previously been held to fall within its scope. In cases not covered by prior precedent, Binnie and LeBel JJ. suggested that federal undertakings would only be immune from provincial laws which “impair” (as opposed to merely “affect”) their operations; in addition, only activities that were vital or essential to the “basic, minimum and unassailable” content of the federal head of power would be immune from provincial regulation. Applying this restrictive doctrine to the facts in *Canadian Western Bank*, the majority held that the business of selling insurance was not a vital or essential part of banking and, therefore, banks that sold insurance as part of their business were subject to provincial insurance regulation as well as federal regulation under the *Bank Act*.⁴²

Canadian Western Bank also provides important clarification respecting the scope of the doctrine of federal paramountcy. As is well known, in cases where there is an inconsistency between valid and applicable federal and provincial laws, the provincial law is rendered inoperative to the extent of the inconsistency. The key challenge has been to define the circumstances in which there is a “conflict” between federal and provincial legislation. Earlier Supreme Court jurisprudence had tended to define situations of conflict quite narrowly, arising only in cases of a direct contradiction between federal and provincial laws. The classic case would be “where one enactment says ‘yes’ and the other says ‘no’”, such that compliance with one law would involve defiance of the other.⁴³ A number of more recent decisions had appeared to suggest a somewhat broader interpretation of legislative conflict, as arising where the operation of a provincial law might “frustrate the purpose” of a federal enactment.⁴⁴ In *Canadian Western Bank*, the majority opinion clarified that in these more recent cases the Court did not intend to

⁴¹ *Id.*, at para. 77.

⁴² S.C. 1991, c. 46.

⁴³ *Multiple Access Ltd. v. McCutcheon*, [1982] S.C.J. No. 66, [1982] 2 S.C.R. 161, at 191 (S.C.C.).

⁴⁴ See, in particular, *Bank of Montreal v. Hall*, [1990] S.C.J. No. 9, [1990] 1 S.C.R. 121 (S.C.C.); *Law Society of British Columbia v. Mangat*, [2001] S.C.J. No. 66, [2001] 3 S.C.R. 113 (S.C.C.).

“reverse its previous decisions and adopt the ‘occupied field’ test it had clearly rejected ...”.⁴⁵ Moreover, the onus of establishing the existence of a conflict lies on the party seeking to rely on the doctrine of federal paramountcy. Applying this framework to the legislation before it, the Court found that there was no incompatibility between the relevant provisions of the *Bank Act* and applicable provincial insurance regulation.

A similar approach was adopted in relation to the doctrine of interjurisdictional immunity by Binnie and LeBel JJ. in *Lafarge*. Lafarge Canada Inc. wished to build a concrete production plant on port lands owned by the Vancouver Port Authority (“VPA”), a federally regulated undertaking constituted pursuant to the *Canada Marine Act*.⁴⁶ VPA approved the facility, which violated certain zoning requirements of the City of Vancouver. The City took the position that it did not have jurisdiction over the lands because they were subject to exclusive federal jurisdiction, but a group of ratepayers filed suit in B.C. Supreme Court arguing the City had incorrectly declined to exercise jurisdiction. The ratepayers’ application was allowed, but was overturned by the B.C. Court of Appeal. At the Supreme Court of Canada, Binnie and LeBel JJ., writing for the same six-member majority that decided *Canadian Western Bank*, held that the lands were not immune from provincial or municipal regulation. They relied on the fact that the lands were owned by the VPA which, although a federal undertaking, was not a federal Crown agent in relation to the lands in question. Moreover, the lessee of the lands, Lafarge Inc., was not a federal undertaking and the activities that were to take place on the land (cement mixing) did not fall within VPA’s core or vital functions, nor were they inextricably bound up with navigation and shipping. Thus there was no basis to invoke the doctrine of interjurisdictional immunity and provincial land use controls could apply.

However, Binnie and LeBel JJ. went on to conclude that there was an operational conflict between applicable federal and provincial regulation and therefore the provincial regulation was rendered inoperative by virtue of the conflict. The operational conflict arose by virtue of differing standards with respect to height restrictions and noise and pollution standards. Therefore the City’s zoning and development

⁴⁵ *Canadian Western Bank*, *supra*, note 40, at para. 74.

⁴⁶ S.C. 1998, c. 10.

by-law was constitutionally inapplicable to the project by virtue of Parliament's exclusive jurisdiction over "navigation and shipping".⁴⁷

Justice Bastarache concurred with his colleagues' disposition of both cases, but disagreed with their approach to the interjurisdictional immunity doctrine. He defended the doctrine as "an essential legal test" necessary in any constitutional challenge to legislation, holding that the proper analytical pattern should always involve a consideration of the validity, applicability and then operability of the challenged legislation. Without the doctrine, Bastarache J. argued, there is no way for a court to read down a provincial law that is inapplicable to a federal matter while still preserving the applicability of the law to "non-federal" matters.

IV. VOTING PATTERNS

In 2007, the justices were only unanimous in 63 per cent of the constitutional cases they heard. This statistic masks the fact that the Court was significantly more divided on Charter issues (only unanimous in six of 12 cases) than it was in federalism cases; all four federalism decisions in 2007 were unanimous in the result. In divided Charter cases, McLachlin C.J.C., Bastarache, Deschamps, Charron and Rothstein JJ. tended to be in the majority. In the 12 Charter cases decided by the Court, Bastarache, Charron and Rothstein JJ. had no dissents, while the Chief Justice and Deschamps J. had one dissent each. Justices Binnie, LeBel and Fish each had three dissents, while Abella J. dissented twice. In all cases except Deschamps J.'s opinion in *B.C. Health Services*, the dissent was in favour of the Charter claimant.

V. CONCLUSION — A STUDY IN CONTRASTS

The most striking feature of the 2007 term may prove to be how much of a departure it represented from recent experience at the Supreme Court. For example, in 2004 and 2005, the Court decided an average of 84 appeals per year, compared to 58 in 2007. The justices were unanimous in 73 per cent of cases in those earlier two years, compared to 63 per cent in the past year, while the average time from

⁴⁷ *Canadian Western Bank*, *supra*, note 40, at para. 59. Note that the Court held that the by-law was inapplicable in its entirety, not just in respect of those provisions which were inconsistent with relevant federal requirements.

hearing an appeal to releasing a judgment has gone from 4.6 months to 6.6 months.

The equilibrium that existed as recently as two years ago appears to have eroded somewhat. As Bastarache J. unexpectedly announced his retirement in April 2008, his replacement could play a pivotal role in the Court's future jurisprudence. It will also be an interesting opportunity to see how the Conservative government will shape the procedure for nominating justices to the Supreme Court. On May 28, 2008, the Minister of Justice announced the details of the process,⁴⁸ which will continue the trend towards openness and transparency begun with the nomination of Abella and Charron JJ. and continued with that of Rothstein J.⁴⁹ Under the new process, the Minister will develop a list of qualified candidates, through consultations with the attorneys general of the four Atlantic provinces,⁵⁰ as well as members of the legal community. The Department of Justice has also set up a website and email address for members of the public to provide input on potential candidates. The list of candidates will be given to a panel composed of five Members of Parliament — two members from the Conservative caucus, and one from each of the opposition caucuses, selected by each party leader. The so-called Supreme Court Selection Panel will be required to assess the candidates and provide an unranked list of three qualified candidates to the Prime Minister and Minister of Justice. The Prime Minister and the Minister will select from that list and the nominee will appear at a public hearing before an *ad hoc* committee of Parliament, similar to the committee Rothstein J. appeared at in 2006.⁵¹

Critics of the committee process that led to the appointment of Rothstein J. suggested that it would lead to the politicization of the judiciary and predicted U.S.-style confirmation battles.⁵² This did not come to pass. However, Rothstein J. was selected by the Conservatives

⁴⁸ An outline of the process is available at the Department of Justice website, <<http://www.justice.gc.ca/eng/scc-csc.html>>.

⁴⁹ In the case of Abella and Charron JJ., Irwin Cotler, then Minister of Justice, appeared before a parliamentary committee to answer questions about how the selection process had proceeded. Justice Rothstein appeared as a witness before an *ad hoc* parliamentary committee prior to his appointment being confirmed.

⁵⁰ Justice Bastarache occupied Atlantic Canada's seat on the Court.

⁵¹ Although not entirely clear from the government press release, it appears that the *ad hoc* parliamentary committee that will interview the nominee will be different from the committee of five Members of Parliament responsible for providing the unranked list of qualified candidates to the government.

⁵² See "The judge responded, and the sky didn't fall" *The Globe and Mail*, February 28, 2006, at A18.

from a shortlist developed under Paul Martin's Liberal minority government, which may have muted any potential opposition to Rothstein J.'s appointment from the *ad hoc* committee or the Liberal caucus. Moreover, the advisory committee that developed the shortlist that led to Rothstein J.'s appointment included non-partisan members, such as a retired judge, nominees of provincial law societies and individuals who were neither judges nor lawyers. Provision was also made for nominees of provincial attorneys general. Under the new process, the panel selecting the shortlist is composed of five Members of Parliament, two of whom are members of the governing Conservative caucus.

Reducing the size of the advisory panel and eliminating the non-partisan representatives and the nominees of the provincial attorneys general appears unwise and entails the risk that the advisory panel will operate in a partisan fashion. Such partisanship could then spill over into the public hearing, which could taint both the nominee and the entire nomination process. In our view, it would have been preferable to retain the structure of the earlier advisory committee, which combined partisan and non-partisan membership. Nevertheless, one positive element is that the government members have a minority on the advisory panel, which may induce the panel to operate in a consensual fashion. If a future majority government chooses to use a similar advisory panel, it should retain this arrangement. It is to be hoped that the government will carefully monitor the impact of the additional changes it has introduced in the current appointment process, and recognize that it may be necessary to make further adjustments in the future in order to ensure that the merit principle remains the dominant consideration in terms of appointments to our highest court.

